15121S303

15121S303

RECORD, CASE NO. 15180.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 841.

SAM HICKORY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 25, 1892.

RECORD, CASE NO. 15180.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 841.

SAM HICKORY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	a	1
Indictment	1	1
Arraignment and plea	4	2
Order that defendant's witnesses be procured at public expense	4	2
Order that defendant's witnesses be procured at public expense	5	3
Order for attachment of Tom Galcatcher	5	3
Order overruling motion for further witnesses for defendant	5	3
Order granting motion for further witnesses for defendant	5	3
Order beginning trial	6	4
Order continuing trial	7	4
Order continuing trial	8	5
Order continuing trial	9	5
Verdicts	10	6
Order filing motion for new trial	10	6
Order overruling motion for new trial	10	6
Judgment and sentence	11	7
Order allowing bill of exceptions, &c	11	7
Bill of exceptions	13	7
Evidence for the Government	13	7
Testimony of Ridge Paschal	14	8
Charles H. Snell	35	19

	Original.	Print.
Bill of exceptions—Continued.		
Evidence for the Government—Continued.		
Testimony of Jay Clark	61	34
John Carey	69	39
Ezekiel P. Paris	102	58
James Anderson	109	62
Dave Rusk	112	64
Bryant Hughes	117	67
Aaron Carey	124	71
Jeff Osage	128	73
Price Cochran	131	75
Thomas Galcatcher	136	78
Elias C. Boudinot (defense witness)	146	84
Dave Rusk (recalled)	148	85
Lucy Carey	149	85
Neal Nugent	158	91
Joseph Keener	164	94
Government rests	164	94
Evidence for defendants	165	94
Testimony of Isaac Shade	166	94
Peggy Shade	175	100
John Johnson	179	103
Arch Downing	185	107
Bryant Hughes	188	109
Aaron Carey (recalled)	194	112
Arch Downing (recalled)	197	114
Thomas Keener	200	115
Isaac Shade (recalled)	212	123
Joe Shade	216	125
Mack Quinton	220	128
Dave Downing	223	129
Joseph Shade	228	132
Tom Keener	236	136
Sam Downing (defendant)	244	140
Handwriting of Defendant Downing as made in presence of jury, offered in evidence. Ruling of court on same	246	141
Testimony of G. W. Benge	249	142
Arch Downing	255	145
Phillip Bennett	257	146
Ollie Williams	260	148
Aleck Stock	280	161
Jim Squirrel	295	172
William Taylor	317	185
C. L. Bowden	322	188
Dave Rusk (recalled)	332	195
G. S. White	334	196
Statement of W. G. Blake taken by agreement, read in evidence	335	196
Testimony of Aaron Carey	337	197
Jim Squirrel (recalled)	339	198
Sam Hickory (defendant, recalled)	343	200
Tom Shade (defendant)	380	222
Isaac Shade (recalled)	399	224
Defendants rest	408	238
Exception to ruling as to testimony of Isaac Shade	409	238

	Original.	Print.
Bill of exceptions—Continued.		
Evidence for the Government in rebuttal	410	239
Testimony of Chas. Snell (recalled)	410	239
Testimony of G. W. Harlow	412	239
James Anderson, (recalled)	415	241
John Carey (recalled)	417	242
Aleck Stock (recalled)	421	244
Evidence closed	429	249
Charge of the court	430	249
Exceptions to charge	494	281
Verdict	495	282
Motion for new trial	495	282
Opinion on motion for new trial	499	283
Judge's certificate to bill of exceptions	516	292
Assignment of errors	517	293
Petition for writ of error	520	294
Affidavit of defendant as to poverty	521	295
Judge's certificate to affidavit as to poverty	521	295
Writ of error	522	295
Citation	523	296
Proof of service of citation	523½	296
Clerk's certificate	524	296

a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in the case of United States vs. Sam Hickory. Indicted for murder.

1 United States of America, western district of Arkansas. In the circuit court, August term, A. D. 1892.

UNITED STATES
vs.
SAM DOWNING AND THOMAS SHADE. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Sam Downing and Thomas Shade, on the 22nd day of September, A. D. 1891, at the Cherokee Nation, in the Indian Country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Joseph Wilson, a white man, and not an Indian, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault, and tha' the said Sam Downing and Thomas Shade with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun they, the said Sam Downing and Thomas Shade, in their hands then and there had and held, then and there feloniously, willfully, and of their malice aforethought did discharge and shoot off to, against, and upon the said Joseph Wilson, and that the said Sam Downing and Thomas Shade with the leaden bullet aforesaid out of the gun aforesaid then and there, by force of the gunpowder aforesaid, by the said Sam Downing and Thomas Shade discharged and shot off as aforesaid, then and there feloniously, willfully, and of their malice aforethought, did strike,
penetrate, and wound him, the said Joseph Wilson, giving to him
2 the said Joseph Wilson, then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Sam Downing and Thomas Shade in and upon the left side of the breast of him the said Joseph Wilson, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Joseph Wilson, then and there instantly died. And so the jurors aforesaid upon their oath aforesaid do say that the said Sam Downing and Thomas Shade, him the said Joseph Wilson, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

2nd count.

The grand jurors of the United States of America, duly selected, empaneled, and sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Sam Downing and Thomas Shade, on the 22nd day of September, 1891, at the Cherokee Nation, in the Indian country, within the western

district of Arkansas aforesaid, with force and arms, in and upon the body of one Joseph Wilson, a white man and not an Indian, then and there being, feloniously, willfully, and of their malice aforethought, did make an assault; and that the said Sam Downing and Thomas Shade, with a certain axe, which said axe they, the said Sam Downing and Thomas Shade, in their hands then and there had and held, then and there feloniously, willfully, and of their malace aforethought, did beat, bruise, strike, penetrate, and wound him, the said Joseph Wilson, in and upon the left side of the head of him, the said Joseph Wilson, giving to him, the
3 said Joseph Wilson, then and there with the axe aforesaid, in and upon the left side of the head of him, the said Joseph Wilson, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Joseph Wilson, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Sam Downing and Thomas Shade, him, the said Joseph Wilson, in the manner and by the means aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

WM. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 29. United States vs. Sam Downing and Thomas Shade. Murder. A true bill. M. T. Dyke, foreman. Filed Oct. 21, 1891. S. Wheeler, clerk. Witnesses: John Carey, lives 15 miles n. west of Talequah, I. T.; D. V. Rusk, lives at Oaks, I. T.; Tom Galcatcher, lives 15 miles n. west of Talequah, I. T.; Neal Nugent, lives 18 miles west Talequah, I. T.; Ollie Hickory, lives 13 miles n. west Talequah, I. T.; Alex. Stop, lives 13 miles n. west Talequah, I. T.; Jim Squirrel, lives 13 miles n. west Talequah, I. T.; Aaron Carey, lives 15 miles n. west Talequah, I. T.; Bryant Hughes, lives 15 miles n. west Talequah, I. T.; Price Cochran, near Talequah, I. T.; Dr. Blake, lives at Talequah, I. T.; J. Clark, lives at Talequah, I. T.; Ridge Pashcal, lives at Talequah, I. T.; E. P. Pond, lives at Talequah, I. T.; Joe Palmer, lives 40 miles NW. Tulsa, I. T.; Chas. Snell, lives at Talequah, I. T.; Jas. Anderson, lives at Luckey's Mills, Cherokee Nation, I. T.; George Harlow, lives at Luckey's Mills, Cherokee Nation, I. T.; Wm. Harnage, lives at Talequah, I. T.; Jeff Osage, 14 miles Creek Cherokee Nation, I. T.; Isaac Mayfield, Talequah, I. T.; Bird Cochran, Talequah, I. T.; Phillip Bennett.

4 In the circuit court of the United States for the western district of Arkansas. February term, 1892.

SATURDAY MORNING, 8½ o'clock, *March* 5, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Record entries.

UNITED STATES
vs.
SAM DOWNING, ALIAS SAM HICKORY. } Indictment for murder, No. 29.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says his right name is Sam Hickory, and that he is not guilty as charged in said indictment, and puts himself upon the country.

FRIDAY, *April* 22, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expenses of procuring the testimony of G. W. Benge, Wm. Triplett, and Phillip Bennett, in behalf of said defendant be paid by the United States, and that a subpœna be issued for them returnable June 20, 1892.

AUGUST TERM, *Monday, Aug. 1st*, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, in writing verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Said application coming on to be heard, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Edward Sunday, Margaret Sunday, Martha E. Baker, E. S. Spriggs, High Tinsley, Ben Adams, N. Selby, and Mary Harrah in behalf of said defendant be paid by the United States, and that a subpœna be issued for them returnable August 11, 1892.

THURSDAY, *Aug.* 11, 1892.

(Caption omitted.)

On this day, on motion of the district attorney, it is ordered by the court that an attachment be issued for Tom Galcatcher to show cause why he should not be punished for his contempt in failing to appear as a witness in this cause when duly summoned thereto.

On this day come the said defendants, by their attorneys, and file their application, in writing verified upon oath, praying for witnesses in their behalf at the expense of the United States.

Said application coming on to be heard, and the court, being fully advised in the premises, doth overrule the same.

THURSDAY, *August* 18, 1892.

(Caption omitted.)

6 On this day come the said defendants, by their attorneys, and file an amended application for witnesses in their behalf at the expense of the United States. Said application coming on to be heard, and the court, being fully advised in the premises, doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Wm. Taylor and Johnson Paris in behalf of said defendants be paid by the United States, and that a subpœna be issued for them returnable forthwith.

FRIDAY, *Aug.* 19, 1892.

UNITED STATES
vs.
TOM SHADE AND SAM HICKORY. } Indictment for murder. No. 29.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal, and by their attorneys, Messrs. Barnes & Reed, and it appearing from the returns of the marshal that said defendants have each been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that they have also been served each with a full and complete list of the panel of petit jurors, and alternates as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and the said defendants having heretofore had hearing of said indictment and each for himself pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon the clerk called the entire

7 panel of the petit jury, and, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause, to wit:

Freeland H. Bridges,	Marcus L. London,	William Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G.W. Meadows,	Jordan D. Wilson.

Twelve good and lawful men of the district aforesaid, duly selected, empaneled and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury, and bailiff in charge, until discharged by order of said court.

SATURDAY, *Aug.* 20, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said

defendants, in custody of the marshal, and by their attorneys, Messrs. Barnes & Reed, and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Freeland H. Bridges,	Marcus L. London,	Wm. Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G. W. Meadows,	Jordan D. Wilson,

who took their seats in the jury box, and after hearing further evidence and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

8 MONDAY, *Aug.* 22, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal, and by their attorneys, Messrs. Barnes & Reed, and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Freeland H. Bridges,	Marcus L. London,	Wm. Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G. W. Meadows,	Jordan D. Wilson,

who took their seats in the jury box, and after hearing further evidence and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

TUESDAY, *Aug.* 23, 1892.

Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal and by their attorneys, Messrs. Barnes & Reed, and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Freeland H. Bridges,	Marcus L. London,	Wm. Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G. W. Meadows,	Jordan D. Wilson,

who took their seats in the jury box, and after hearing the balance of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

9 WEDNESDAY, *Aug.* 24, 1892.

(Caption omitted.)

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal and by their attorneys, Messrs Barnes

& Reed; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Freeland H. Bridges,	Marcus L. London,	Wm. Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G. W. Meadows,	Jordon D. Wilson,

who took their seats in the jury box, and after hearing the balance of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

THURSDAY, *Aug.* 25, 1892.

(Caption omitted.)

On this day come the United States of America by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas and come the said defendant in custody of the marshal and by his attorneys, Messrs. Barnes & Reed; and now come the jury heretofore empaneled for the trial of this cause in charge of the sworn bailiff of this court, to wit:

Freeland H. Bridges,	Marcus L. London,	Wm. Reeves,
Fletcher Gossett,	John K. Mount,	Wm. E. Scruggs,
James Harrison,	Wm. F. Mayo,	Winfield W. West,
David C. Jones,	Reuben G. W. Meadows,	Jordan D. Wilson,

who took their seats in the jury box, and after receiving the charge of the court, which was at the time excepted to by the defendants through their attorneys, retired, in charge of the sworn bailiff aforesaid, to consider o their verdicts, and after a short time returned into court the following verdicts, to wit:

"We, the jury, find the defendant, Sam Downing, alias Sam Hickory, guilty of murder as charged in the first count of the within indictment.

(Signed) "F. H. BRIDGES, *Foreman.*"

"We, the jury, find the defendant, Thos. Shade, not guilty as charged in the first and second counts of the within indictments.

(Signed) "F. H. BRIDGES, *Foreman.*"

Whereupon the jury was by the court discharged from the further consideration of the case, and the said defendant, Sam Hickory, remanded to the custody of the marshal to await final sentence, and the defendant, Tom Shade, discharged of and from said indictment in this cause.

MONDAY, *Sept.* 12, 1892.

(Caption omitted.)

On this day come the said defendant by his attorneys and files his motion to set aside the verdict of the jury and for a new trial in this cause.

THURSDAY, *Sept.* 15, 1892.

(Caption omitted.)

On this day come to be heard the motion heretofore filed by the defendant to set aside the verdict of the jury and for a new trial in this cause, and the court, being well and sufficiently advised in the premises, doth overrule said motion.

11 MONDAY, *Sept.* 19, 1892.

(Caption omitted.)

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, Sam Hickory, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 25th day of August, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said Sam Hickory to be taken hence, and him, the said Sam Hickory, safely and securely keep, from the date hereof until Wednesday, the 2nd day of November, A. D. 1892, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Sam Hickory to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of November, in the year of our Lord one thousand eight hundred and ninety-two, cause the said Sam Hickory to be hanged by the neck until he is dead.

SATURDAY, *Oct.* 15, 1892.

(Caption omitted.)

12 On this day come the said defendant by his attorneys and tenders his bill of exceptions and asks that the same be signed and made a part of the record in this cause; which is accordingly done.

And the defendant also files his assignment of errors and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

13 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas, August term, 1892.

UNITED STATES
vs.
SAM HICKORY & TOM SHADE. } Murder.

Be it remembered that on the trial of the above-entitled cause the Government, to maintain the issues upon its part, produced and examined the following-named witnesses, to wit: Ridge Paschal, Charles H. Snell, Jay Clarke, John Carey, Ezekiel P. Paris, James Anderson, Dave Rusk, Bryant Hughes, Aaron Carey, Jeff Osage, Price Cochran, Thomas Galcatcher, Elias C. Boudinot (defense witness), Lucy Carey, Neal Nugent, Joseph Keener—(to the introduction of the testimony of Charles Snell the defendants, through their counsel, objected at the close of his testimony in chief and moved to exclude the same upon the ground that no notice

had been given said defendants forty-eight hours before the trial or at any other time of the purpose of the Government to use said witness in said case, which motion and objections the court overruled, to which the defendants at the time excepted)—who testified, respectfully, as follows:

14 RIDGE PASCHAL, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. State your name.

Answer. Ridge Paschal.

Q. Where do you live?

A. I live at Tahlequah, Cherokee Nation.

Q. You are a United States commissioner there, are you not?

A. Yes, sir; of the first division of the Muskogee court—one of the United States commissioners.

Q. Did you know Joseph Wilson in his lifetime?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. He was a deputy marshal for the Muskogee court; a white man, and not a citizen of the Cherokee Nation.

Q. Do you know these two defendants?

A. I barely know them; I know Tom Shade, and I know Hickory merely by association; I have seen them before.

Q. Which is Shade and which is Hickory?

A. The one with the black coat on is Shade and the other Downing, or Hickory. I barely know them.

Mr. BARNES (of counsel for defense). You have got them wrong; it is just the other way.

The WITNESS. I know them no more than persons passing back and forth.

The DISTRICT ATTORNEY. Is Wilson alive or dead?

A. He is dead.

Q. Please state if you were along when his body was found.

15 A. I was along immediately after his body was found; in other words, I was trailing the body up, and in going up to the point, Zeke Paris and me, I said "We are on the trial; it looks like we are going to find the body," and they said "You needn't look any further; his body is right over there."

Q. You were right behind the men that found the body?

A. Yes, sir; just a few minutes.

Q. How far was it from Tahlequah where you found the body?

A. It is about 10 miles on a straight line. The way we went it is about 11 or 12.

Q. Do you know where Big Aleck lived?

A. Yes, sir.

Q. State when it was when you went over there and how came you to go.

A. I went over there on the morning of the 25th of September, 1891; Hogshooter and Anderson——

Q. That is John Carey, the one you call Hogshooter?

A. Yes, sir. He told me things that I concluded the marshal, one of them, was in trouble. This was on Thursday evening, and I made arrangements to go in the morning. There was no deputy marshal in Tah-*elw*uah at that time. Little Snell had been appointed, but not regularly enforced. I made arrangements to go out there, and I went to the sheriff, Joe Clarke, of Tahlequah district——

Q. The Indian sheriff?

A. Yes, sir; and sent word by Anderson and Hogshooter for the parties living out in that country to get together, and that we would meet them in the morning and go up to make the search.

Q. Meet them at Tahlequah?

A. At Lucky's mill. That is the headquarters out in that section. Paris and I drove out there in the morning; drove out from Tahlequah to the mill.

Q. What was Paris's given name?

16 A. Zeke Paris, the one that is here. He was the sheriff-elect. Clarke had been the sheriff, and was going out, and Paris was elected to take his place. We went out there, and we found these witnesses here, a great many of them, and others, and we had a party, I suppose, of 20 or 25, and while they were moving along I got on a horse, and myself and old man Harlow went up to Big Aleck's house. We were ahead of the party five or six minutes.

Q. That was on Friday?

A. Yes, sir; Friday morning, the 25th.

Q. Go ahead.

A. Got up there, and Big Aleck and John were there.

Q. Where did you find Big Aleck?

A. Setting at his house on his porch. Harlow and myself rode up, and John got up and walked around the house.

Q. What John?

A. I don't know his name. He is one that lives with Big Aleck, an old Indian, long hair. As far as Aleck and myself and John and Harlow were concerned it was like a Frenchman meeting a German. Although we are both Cherokees, we could simply say, "Howdy," and that is as far as we could progress. I do not talk Cherokee and Aleck won't talk much English.

Q. You are a Cherokee, however?

A. Yes, sir; I am a half-breed, but I do not talk the Cherokee language, and he does not talk much English, or won't, and that morning he wasn't inclined to talk a bit. I went out there and looked around there in the lot, while John Carey came up with the rest of the party, and then I told Carey to commence asking Aleck, to tell him what I came for, to look for the marshal. Well, he said that he didn't know; that he

17 was absent from there; that he didn't take an account of it. I can only tell what Aleck said through an interpreter.

Q. You learned that he had been absent from there?

A. He claimed to have been absent. I told him, through an interpreter, that I came to look for the marshal; that if he was wounded I wanted to take care of him, and if he was dead I wanted his body.

Q. When did you learn that the marshal was probably there; who did you learn it from?

A. I learned it from Hogshooter and Anderson when they first came in there; when we got scattered around there there was a little sign of blood there.

Q. You go on and tell all about what you found there.

A. Well, we went in the house and he said he didn't know where he was, and he gave me the freedom of the country there; he told me that I could look and I took him at his word, and I looked. I asked old John if he would go along with me and he said he would, and Aleck said something to him in Cherokee and John went back on hiss promise to go with me after he told me he would go; he said he had changed his mind, and I said. "You had better come and go along," and I went around and looked and there was blood on the place.

Q. Where was that blood you found outside, now? [Witnesss is shown a diagram of the surroundings.]

A. There is a wagon right out here and a smoke-house here, a*b*d blood here.

Q. How far from the house did you find this blood?

A. I suppose it is between 20 and 30 steps; probably not over 30 and certainly not under 20. We looked around there and I took John and Little Snell——

Q. You say the blood is 20 or 30 steps from the house?

A. Yes, sir; I suppose that is it.

18 Q. Near where the wagon was you found blood?

A. Yes, sir. I asked him what made it and he said—or the interpreter gave it to me and I supposed that he said it—that a dog might have been shot out there, or an animal. We started off and John said he would go with me, and we went.

Q. One moment before you go on to that. Did you make any examination of the house?

A. We looked around it, but I made the examination more when we came back.

Q. Go ahead then.

We went off, and Snell and John and myself and John went down, and the house lay in that way and we went in here, and we got where the path went out of the road there was blood.

Q. What direction is that from the house?

A. It would be southwest. There was blood there. A party called my attention to the fact that there was blood there and I told them to go along and follow up that trail; John seemed to be playing bird with me and I would let him play bird, and I would go along with him, and he said this way, he said the man's body is up here. I thought I would go along with him and let him play bird awhile; I went from there with him, and we hunted from there, and John played out; we were all walking; I jumped off the horse and walked along with them. When we got back to the boys they hollered and I went down there and they found a dead horse.

Q. Did you know whose horse it was of your own knowledge?

A. No, sir; I could not swear to that. I found the horse, and it was the horse that Joe Wilson had been riding on Sunday when I saw him, but I don't know about the horse positively.

The COURT. Do I understand you to say you saw him riding

19 that horse the Sunday before?

A. Yes, sir; I think it was that horse; I didn't look at the horse closely; it was a horse recently purchased.

The DISTRICT ATTORNEY. You found that horse; where was it?

A. It was down the side of a little branch, I suppose 150 or 200 yards from the house, west of the house. He had indications of being shot in the knee, and about his throat, whether it was cut or not, I can't say; the horse was somewhat decayed and the buzzards had been about him.

Q. Was there any saddle or bridle on him?

A. No, sir; no bridle or saddle. Well, we went back to the house then. When we got back to the house Harnage and Clarke had got up there, and Clarke is a North Carolina Cherokee, who talks the language, and he had somewhat of a conversation with them. We went in the house and made an examination.

Q. State all you found there?

A. At the front door there is a ball apparently came out of the house through the door; well, it struck down under it at the bottom of the door, just that way [indicating], glanced that way, come out of the house. We found at the partition door where a ball had struck and glanced the door, went over this way [indicating], and struck the other place and went out.

Q. The west wall?

A. Then the question came up. I had heard that theory, that the marshal shot him through the window, shot through the window, and I wanted to see if he could. The window is off on that side, and we went there and tried it, and you could not lean over and shoot through.

Q. Shoot through the middle door?

A. No, sir; a fellow could not do it unless he shot through the wall. After a little Harnage said, "I looked at these planks and found some blood near the door." We looked at the planks, we took them up and turned them over, and on the planks was blood.

Q. On the under side?

A. Yes, sir; on the planks was blood on the underside. There was a little more blood at the door, at the outer door that way, than there was back there.

Q. Point out on this map where the blood was.

A. [Witness does as requested.] A. Commencing from the center of the door went back here, and when we got out of this door there was a short plank there, and we found blood trailed back to the blood out here [indicating on map].

Q. Is this map a fair representation of the house and surroundings there?

A. Yes, sir.

Here court took a recess until 1:30 p. m.

AFTERNOON SESSION—1:30 P. M.

The DISTRICT ATTORNEY. You say you found a horse?

A. Yes, sir.

Q. You may go on and state what occurred after finding the horse?

A. Before dinner I had stated about finding the horse, and had got back to the house, and said I had been in the back room——

Q. Yes; you have described that. Then what did you find?

A. I then asked Aleck and John the question, through an interpreter, if they could give me any information about where the man was, because, evidently, he had been shot up there. The' said they didn't know
21 where he was. There was some conversation then between the interpreters, Hogshooter and Clarke, and myself, and Aleck told me, in answer to a question through the interpreter, that he had been absent, and when he got back, he found the house shut up like we found it, and he asked Sam what it was and he told him——

Q. E'at he told you what they said would not be competent.

A. I said, "If we can get no information here we will hunt for the marshal until we find him." We divided up into parties there, about 4 or 5 or 6 of us to a party; there was about 25 boys and we spread out like a fan; we spread out all over that country. We scouted around there, and moved backward and forward, and I suppose the parties covered 25 or 30 miles, I suppose, around over the country, and the agreement was that whoever found the body would fire a signal. Well, after awhile, an Indian told me—nearly a ful' blood—he had found a place where a wagon had been around, an' I said, "Very well; we will take and trace that wagonn up and I guess we will find the body." We took that trail and followed it, and without any trouble, because we followe' it in a walk and a fast trot. And when we got nearly off a mile and a half, I would take it to be northeast from the house, I saw Paris and one or two with him out there, and I said, "We have struck a trail over here and it is fresh," and he said, "You need not follow it any longer; the man is right over there; you will find him right over there." He said he found him, and I said, "Why didn't you fire a signal?" and he says, "You were all coming up," and we then fired a signal for the parties to come in.

Q. For the balance of the party?

A. Yes, sir; the other parties out; we had divided into sections
22 and they came up. It was at the head of one of these round gulches that are in those hills over here everywhere, and the gulch would run down nearly from here to that brick building over there, and there is a deep place, and he had been dragged—the wagon had come up there and the man had been drawn out and dragged down I suppose 25 or 30 feet down. The man lay in this way.

Q. Crossways, lengthways of the gulch?

A. Yes, sir; lengthway of the gulch. He was laying with his head to the west, towards Talhe*lw*uah in the Indian Territory. The body was very much decomposed, and it was very offensive, and I managed to get to it myself with a great deal of trouble. There was wound in the right breast and his shirt was pulled a little up, and I stepped around to his head and the hair was dropped off from a place in the head; loooked like a wound of some kind in the head; I made no minute examination of it. I called attention to the wound of some parties. The body was that of Joe Wilson. I knew it was Joe Wilson like I know a man I could tell you. His eyes were almost eaten up by maggots, which helped to destroy the identification. As the party gathered in there Clarke came in, and he started towards the body of Wilson and keeled over, the stench was so bad. I said to Little Snel, "You go over there; you have known him longer than anybody else, and thoroughly identify that body, and see if he has a writ in his pocket;" I said I gave him a writ for Sam Downing and there ought to be a writ on him for Sam Downing and other people.

Q. Sam Downing, that is, this defendant, one of them? Sam Downing is Sam Hickory?

A. Yes, sir. I can't say that I ever seen Sam Dowining any
23 more than passing in the street. The other man, Shade, I once had a conversation with, and I had known them like I had known Indians living there.

Q. Go ahead.

A. I said "Go and get these papers; see if the papers are on him," and they went and brought him up on the hill, there, and got the papers. There was a writ which I had issued against Sam Downing, called Hickory, for introducing and disposing of whiskey, issued in the usual form, with my hieroglíphics on it. They brought them up there, and I don't know where the subpœnas were—the subpœnas were not with him: that can be explained by the fact of the violation of the rule, sometimes, in the summoning of witnesses. But the papers were bloody. They found his watch, and a lead pencil, between the place where the wagon was stopped and where the body was. We were on horseback, and if the man had been fresher we would have put him on the back of a horse. I said, "We will move him in."

Q. [Witness is handed a paper colored with blood.] Is that your signature?

A. Yes, sir; that is mine; that is the writ. Here is a subpœna for Aaron Carey, and John Starr. I didn't think the subpœnas were along, but this is it here. The watch was an open-face watch, and this watch here bears a resemblance to it, and this lead pencil here is the pencil that we found there.

Q. Who was it, do you remember, got these papers off of the body? Was it Snell?

A. Yes, sir; they were turned over by Snel to me, and I took them to the marshal's office at Muskogee, and turned them over to Thomas B. Needles.

Q. He is the marshal of that district?

A. Yes, sir; and I turned them over to him myself, and told him to keep them and send them to you whenever the trial came up.

24 Q. I see there are several papers here with his name on them?

A. Yes, sir. Then we went back to the house. In going back to the house I told the boys to strike the trail and trail the wagon back. We trailed the wagon back where it started, near the house.

Q. How far from that pool of blood where you trailed the wagon?

A. About a mile and a half——

Q. You trailed it back to the point where it stood?

A. Yes, sir.

Q. It stood how far from the blood you found out there, the pool of blood you found on the outside where it was? You say you trailed the wagon back to the house to where it had stood at the house; you spoke of their being a pool of blood out there near the wagon——

A. It was 10 or 15 feet, I suppose, from the blood.

Q. You trailed the wagon clear back, did you?

A. Yes, sir; that is, back to Big Aleck's house, in the Tahlequah district, Cherokee Nation, Indian Territory. I then went in to Big Aleck, and he asked me if I had found it. I said "Yes, we found it," and told

him where it was. I then said something about wanting the wagon, and with that frontierism one of them said, "Just take the wagon," and I said "No, I won't do that; I have got no right to appropriate his wagon, for me to violate the law because somebody else has done it." I went and I said to Aleck, "I want that wagon to bring that man down to Lucky's mill, and I will pay you for it," and he said "No, I don't want any pay," and that I could have the wagon, but he didn't have any horses. I had left Snell and Anderson out there and, I think, one or two others. I know when I told Snell to stay and take care of the body he made a pathetic speech in which he said he didn't want to be left alone with the
25 murdered man's body by himself, and I told him the man couldn't hurt him. He had no idea of being either a hero or a martyr, and so I left a guard with him; gave Anderson my pistol. They came back with the wagon, and Clarke and myself and Harnage went to town to make arrangements.

Q. Did you examine the wagon?

A. Yes, sir; I looked at the wagon.

Q. Did you find any blood in it?

A. Yes, sir; I didn't look at the wagon until Joe Clarke called my attention to the fact that there was blood, and I went and examined it.

Q. How did you find it?

A. There was blood in the bottom of the wagon, and then I spoke to Aleck: The man is decomposed, and it would be a hard matter to haul him back, rattling and jolting through the woods, and I want a spread of some kind, one of your coverlids or blankets, or anything, and I will pay you for it, because it will ruin it." He said that was all right; "I will let you have one;" and he pointed over to a wagon cover, an old one, and he said I could have that. I went to look at the wagon cover, and when Clarke and myself looked at it there was blood all over that. I said, "I don't think it will hurt him any worse to ride him in on it than it did to ride him out, so I will take it."

Q. You took it?

A. Yes, sir; I sent it out with these men and they brought the body back in. By this time, the next morning, I commenced to incase it, hurry it out, and a Fort Smith marshal came up—they brought Wilson's body in to Tahlequah.

Q. Did you see an axe there?

A. No, sir; if there was an axe there, I didn't see it. I
26 brought Wilson's body into Tahlequah. When we got the body into Tahlequah we put it downstairs, below in the room where my office is, and it was terrible offensive; we couldn't any of us go near it, and I got Drs. Blake and Thompson to go and look at the body, and started to hold an inquest. By this time some of the people in an adjoining hotel commenced to complain, and I didn't blame them; it was a terrible stench. And I told Drs. Blake and Thompson to make an examination, and I telephoned to the district attorney, and his assistant came down to the telephone, and he told me to hold an inquest, and I called his attention to the omission of the incorporation of that court up there where I am made a justice of the peace with the power to serve or summon, but no power to arrest; that the man was dead and that was all there was to it; that there was no doubt he was dead; there was a hole in his

breast and one in his head; and he telephoned me back not to go any further, to bury the man. I buried him, or had him buried. Now, that was the thing about it. I have held two other conversations with Big Aleck through the interpreter, if you wish to hear it. I can't give you the date because it was several days after; there was a rush and determination to go out there and arrest somebody that morning when I was out there they were wanting to arrest *arrest* them. I said, "No; I am investigating; I am not arresting; I am trying to get down to it." I received a message from Big Aleck, said he wanted to interview me, see me with his own interpreter.

Q. Who was that Big Aleck?

A. I don't know the relationship, but I am told that he is either the granduncle or the grandfather of Hickory, that he wanted to see
27 me, and I told him or sent word back, that whenever he was ready—this came through my constable—that whenever he was ready to come on down to my office, and I would see him. The next thing I heard was that the Fort Smith marshals had arrested Aleck. I looked for him that night with Clarke, and I could not find him; and I went out the next morning to Naked Head, three or four miles in the country, and I found Snell and another guard whose name I forget now out there guarding Aleck, and they had this man, whichever one of them they call Shade, ironed, and him ironed; and I spoke with some passionateness, and I said that man had come to see me. ——

Q. I do not care about that.

A. While out there with Aleck I fel' in conversation with the man that was ironed to him, and I made no effort to draw him out, the one that I suppose is Shade, and he told me——

Q. That is, one of these defendants?

A. Yes, sir; whichever one is Shade. He was with Aleck under arrest, and he told me that Aleck had come and told him that Hickory was in trouble and wanted to see him; he hadn't gone to Aleck's house, but he had gone to the Blue Spring schoolhouse and seen Sam there.

Q. That is, Sam Hickory?

A. Yes, sir. Now Big Spring schoolhouse is about five miles from Big Aleck's. He said he hadn't gone to see Hickory at Aleck's, but he said he told him Hickory wanted to see him at Blue Springs schoolhouse, and he didn't tell me what conversation took place, because I was merely there to get the irons off of Aleck, which I did. That is about all I know bearing on the matter. I made no minute examination of these wounds, because I had the doctor do that.

28 Q. You say the body was about a mile and a half from Big*b* Aleck's house?

A. Yes, sir.

Q. It was at Big Aleck's you found these shots?

A. Yes, sir.

Q. Do you know whether the defendant Hickory lived with Big Aleck or not?

A. Big Aleck told me so. I am told that Sam is some relation of Big Aleck; a grandson or a grandnephew; I am not certain.

Q. How many shots did you find in that house?

A. There was two going this way through that middle door, and there were two—one hit the jam' and another one——

Q. In the middle door or the front door?

A. One struck the middle door, and one here went clear without striking, and then there was two in the front door. That is all I remember; if there was any more I don't remember.

Q. Did you see any blood about the house except in the back room and *o*going out to that pool of blood by the wagon?

A. Nothing except on the wagon sheet.

Q. Where was the wagon sheet?

A. In the right-hand corner of the house.

Q. It was in the house, was it?

A. Yes, sir.

Q. What is this man's name that lives with Big Aleck?

A. His name was John; he has got some Indian name I could not pronounce. He is the old fellow with the long hair. He had agreed to go out with me that day, and Aleck told him something in Indian and he went back on his agreement; he refused to go—no, not refused to go, either, but he said he had changed his mind, and finally he agreed to go.

Q. Did Big Aleck go out with you?

29 A. No, sir; I didn't expect him to, because he is aged, he is old. After that they brought Big Aleck to to*n*n, and I had conversation with him, which was through an*n* interpreter.

Q. Never mind that talk. How far was it from where you found the track where the wagon had stopped, up on the hill, down to where the body was?

A. I suppose about 30 feet, between 20 and 30 feet, slanting down this way [showing].

Q. Steep?

A. Yes, sir; a man would have to throw himself to walk.

Q. When you were there was on the 25th of September, on Friday?

A. Yes, sir; 1891. I was there from about 11 o'clock to about 4; was there about five or six hou's hunting for him.

Cross-examination by Mr. THOMAS H. BARNES:

Q. Was it just the running gear of the wagon that was bloody, or was the blood in the bed of the wagon.

A. The blood was in the body of the wagon.

Q. I just want to know whether the wagon had the appearance of the body being hauled off on the running g'ars of the wagon or in the bed of the wagon?

A. It seemed to be in the bed of the wagon, what I saw.

Q. Where was the wagon when you went there?

A. The wagon was standing up there right about 20 or 25 steps from the house; about five or ten steps from where the pool of blood was.

Q. If this body had been carried off in the wagon, the wagon
30 had been brought back near to the place where they started?

A. Yes, sir.

Q. Was the bed on the wagon when you went there?

A. I think not. My impression is that the bed was not on the wagon; had been taken off.

Q. By the body you mean the bed of the wagon?

A. Yes, sir.

Q. Are you sure there was signs of blood in the bed of the wagon?

A. No; I was mistaken about that; the sign was one place about the wagon.

Q. But not the bed?

A. No, sir.

Q. Then, of course, you could not say whether the bed of the wagon had been used in hauling the body away or not, if there was no sign of blood in the bed, but only on the running gears?

A. I can't remember, now, about the blood being but one place about the wagon.

Q. And then, when your attention is called to it, you remember that the bed was not on the wagon when you saw the wagon?

A. I do not remember that distinctly.

A. You do not think it was?

A. I don' think it was, since I reflect; I think the bed was off the wagon.

Q. What was the character of the country between this house and the place where you found this body?

A. It is a little rocky. There was a road leading within some little distance of the place; one of these rough country roads.

Q. How near do you think that the road went to the place where the body was pitched over the cliff or bluff?

A. I think it went in about 200 yards.

Q. Timber from over there to the bluff?

A. Yes, sir; that is my impression; it didn't go right in the
31 road; came around a place where they knocked down a sapling.

Q. Kind a rough place, some woods, and stil' a wagon could get through it?

A. Yes, sir; a wagon could travel there.

Q. You say you noticed where saplin's had been knocked down as it went along?

A. Yes, sir; the bushes had been knocked down; the road wasn't used very much; just one of these little country roads, a trail more than anything else.

Q. I suppose there at the head of this gulch it was rough and some timber and rock and so on.

A. Yes, sir.

Q. Could you tell whether the body had been pitched h'adforemost or feet foremost, or sideways down the gulch?

A. I should have said the body was dragged.

Q. Dragged to the edge and then pitched over?

A. No; dragged down and then shoved down.

Q. Both of these old men were there when you went to the house, I believe you say?

A. Yes, sir; they were the only persons about there at that time, or the only persons that I saw.

Q. Which did I understand you to say; that this place where you saw the pool of blood out from the house was 20 or 30 yards from the front door of the house or 20 or 30 yards from the corner of the porch?

A. I didn't say that, but it is about 20 or 30 yards from the building. I would say it is about 30 yards, because the front door in the porch stands over a little piece, and I would say about 20 steps from the building.

Q. It don't make very much difference, but I didn't gather which you said; from this point, or this point?

A. I should have said 20 or 30 yards from the building. I did'nt
32 measure it only with my eye.

Q. Was there any other house around there except this smoke-house that is marked on this diagram?

A. I don't remember any. There is something over here [indicating] a field or something; but that is all I remember.

Q. Do you know what direction the road runs there about the house, what direction?

A. The road comes in there and goes around here [indicating on map].

Q. And goes in kind of in here and around the house towards th' northeast corner?

A. Yes, sir.

Q. Where was it you talked to Shade when he was chained to Cig Aleck, to the one that was chained to him?

A. It was about three or four miles from Tahlequah, out on the edge of the prairie.

Q. What day was that?

A. I can't tell you that.

Q. How long after this occurred?

A. Several days after this occurrence. I can't locate the date to save my life when it was.

Q. Do you know where he was arrested, and wasn't he arrested there in the town of Tahlequah. I am speaking of Shade?

A. I don't know where he was arrested; I wasn't present when he was arrested. My impression is——

Q. Of course, if you don't know——

A. I could come mighty near giving it. It was in town. That is my impression.

Q. It was after he was arrested?

A. Yes, sir.

Q. He was after that time brought on down here, I suppose?

A. Yes, sir; it was 2 or 3 days before he was brought down here; I had been out to see Aleck.

Q. Was it at the marshal's camp you saw him?

A. Yes, sir.

33 Q. It was at the marshal's camp you saw him and talked to him when he was chained there to Aleck?

A. Yes, sir; when I got Aleck turned loose Shade was chained there.

Mr. BARNES. I doubt whether that statement that was brought out under these circumstances was competent.

The COURT. There is no evidence showing that it was incompetent. The fact that he was under arrest would not make it incompetent.

Mr. BARNES. The fact that he was chained—

The COURT. That does not make it incompetent.

Mr. BARNES (to witness). All these papers were found on the body of this man, you say?

A. Yes, sir. I don't have any remembrance of seeing that subpœna at the time we found them; they were clotted up.

Redirect examination by the DISTRICT ATTORNEY:

You know that Joseph Wilson was a deputy marshal?

A. He had brought men to me.

Q. He acted as such?

A. Yes, sir; and he had sworn out writs before me and the chief marshal sent them back approved. I don't remember of ever seeing his commission.

Q. But you know that he acted as a deputy marshal?

A. Yes, sir; when he made affidavit before me I forwarded it to the marshal's office, and the marshal returned me writs for him approved. We have the same rule there you have here. He swore to his accounts before me as a marshal, and swore he was a deputy marshal before me.

34 Recross examination by Mr. BARNES:

What aged man was Wilson, do you know?

A. I should suppose he was about 25; he might have been anywhere from 19 to 25; he was a smooth faced boyish-looking man; I could not tell his age.

Q. Where did he live?

A. He was from Texas originally.

Q. Did he have any family there?

A. No, sir; he had no family.

Q. How long had he been a deputy, do you know?

A. He had been a deputy a short time. He had reported to me, I think, there some five weeks before that. Whether he had been a deputy elsewhere or not before he reported to me, I don't know.

Redirect examination:

The DISTRICT ATTORNEY. In this talk you had with Shade when he was chained to Big Aleck, when was it that he said he went to get along with Sam?

A. He put that the next day after the killing; after Aleck came to him and told him that Sam had gotten into trouble.

Q. Then he went and met him at the schoolhouse?

A. Yes, sir. I don't know whether he sent Aleck to him; I didn't go into the particulars. He told me that he didn't go to Aleck, but to the Big Spring schoolhouse, and met Aleck there.

The COURT. You have no doubt that the body you found there was the body of Joe Wilson?

A. No, sir.

35 CHARLES H. SNELL, having been duly sworn on behalf of the Government, was examined by the district att'y, and testified as follows, to wit:

Q. What is your name?

A. Charles H. Snell.

Q. Where do you live?

A. I have been living at Tahlequah.

Q. Are you a deputy marshal up there?

A. Yes, sir.

Q. Did you know Jos*eph* Wilson in his lifetime?

A. Yes, sir.

Q. Is he alive or dead?

A. He is dead.

Q. Was he a white man or an Indian?

A. He was a white man.

Q. A deputy marshal?

A. Yes, sir.

A. You know him to be a d'puty marshal at the time he came to his death?

A. Yes, sir.

Q. Did you know whether he had in his possession a writ for the arrest of Sam Hickory?

A. Yes, sir.

Q. Had you ever seen the writ before he was killed?

A. Yes, sir.

Q. Take this writ and subpœna that I now hand you, and see if you know of his having those in his possession.

A. Yes, sir.

Q. I believe you were with the party that found the body?

A. Yes, sir.

Q. How long before you found the body was it that you saw him with these papers in his possession?

A. He was living at my house; that is, he was boarding with me at the time those writs were got out. I was the one that filed the information; I was riding posse for him at that time.

Q. That was before you became a deputy marshal?

A. Yes, sir. I was the one that took the information for those wri*st* and sent them in for Mr. Wilson, and went with Mr. Wilson before Mr. Paschal and swore as a posse to the information received from those writs. I was there when Mr. Wilson received the writs and the
36 subpœna.

Q. Mr. Paschal was a United States commissioner?

A. Yes, sir.

Q. I will ask you when it was you last saw those writs when he was alive?

A. On Sunday morning before he was killed. He was killed on the 22d, and I saw him on Sunday morning before.

Q. Sunday morning before the Tuesday he was supposed to have been killed?

Q. Yes, sir.

Q. And these are the writs?

(The district attorney here introduced the writs aboved referred to, before the jury, for the purpose of identifying the body of the deceased. The district attorney stated that "this is a writ for Samuel Downing, issued by Mr. Paschal, charging him with the introduction of ardent spirits in the Indian country. The other paper is signed by Mr. Paschal, and is a subpœna in the case for Aaron Carey and John Hair, also signed by Mr. Paschal, United States commissioner.")

Q. These writs, you say, were in the possession of Joseph Wilson?

A. Yes, sir.

Q. Where did you next see these papers?

A. I helped take them off the body of Joseph Wilson.

Q. You took them from the body after he was dead?

A. Yes, sir; I held the vest open while James Anderson took them out of his pocket.

Q. Please state if you got all these papers I have here from the body.

A. Yes, sir; that is, I won't state positive until I *saw* them; but I can identify all I got.

37 Q. Without seeing them, can you remember what you got from his body?

A. Well, pretty much. I think there was some receipts that Mr. John Patrick, at Braggs, gave him for five dollars payment. I think each receipt called for that sum that Wilson had given him. And also I gave him an order, in my own handwriting, for a yearling heifer that I sold him that was running at Mr. Bowden's, four miles south of Gibson.

Q. You say you remember of a paper being signed by Patrick.

A. Yes, sir.

Q. Look at the paper I now hand you and see if that is it?

A. Yes, sir; that is Mr. Patrick's handwriting.

The COURT. Did you find that paper on him?

A. Yes, sir.

The DISTRICT ATTORNEY. I introduce that in evidence. It is as follows: "Received of Jo Wilson, ten (10) dollars on deposit. (10.00.) (Signed) J. J. Patrick, Pr. Hayes. 6–26–91." On the back of it is the following: "Indian Territory, 1891. Bought of John J. Patrick, dealer in general merchandise, groceries, dry goods, clothing, etc. Highest cash price paid for cotton, corn, cattle, and all farm produces, hides, pelts, etc." This receipt is written on the back side of a letter head.

The WITNESS. I wish to make a correction. I said this receipt was in Mr. Patrick's handwriting. I think it is Mr. Hayes's handwriting; Mr. Hayes was clerking for him at that time.

Look at these two papers I now hand you, and state whether or not they were on his body when found?

A. Yes, sir.

The DISTRICT ATTORNEY. I will now introduce those two

38 papers. They are as follows:

"Registry receipt. Post-office at Braggs. Registered letter No. 21. Received 10–4–1890, of Jo L. Wilson, Braggs, addressed to Humphrey, Frederick & Rutherford, Fort Smith. T. R. Maddon, P. M., per Jno. S. T., Asst."

"Registry receipt. Post-office at Braggs. Registered letter No. 39. Received 2–14–1891, of Jo L. Wilson, Braggs, addressed to Washington Detective Agency, Washington, Iowa. T. R. Madden, P. M."

Q. See if you got the paper I now hand you from his body?

A. Yes, sir; I wrote that myself.

Q. Did you find it on his dead body?

A. Yes, sir.

The DISTRICT ATTORNEY. I will now introduce in evidence the paper last identified by witness, which is as follows: "Tablequah, I. T., Aug.

the 1st, 1891. I, Charles H. Snell, have this day sold for the sum of $6 dol., to Joe Wilson, one yearling heifer, branded J. M. C. connected, coller red, with a little spot or stripe in forehead. Running at U. S. Marshal Bowden's. This witnessed by Mrs. Charles H. Snell and Smith Marsh. (Signed) Charles H. Snell, Tahlequah, I. T."

Q. You wrote that; did you?

A. Yes, sir; that is my handwriting.

Q. That is dated August first, 1891?

A. Yes, sir.

Q. Did you give it to him on that day?

A. Yes, sir.

Q. That is one of the papers taken from the body?

A. Yes, sir.

39 Q. Did you take this pocketbook from his body?

A. Yes, sir, his daybook.

Q. Here are papers that seem to not have been taken out before, and I will take it out. I find it is registry receipt for some money that he has registered. I do not care for that, particularly.

Mr. BARNES. I think the district attorney should be required to introduce all papers found on the man's body.

The COURT. I think that is a matter in the discretion of the district attorney as to how much evidence he shall introduce.

The DISTRICT ATTORNEY. Do you know whose watch this is?

A. I took that watch off of his body.

Q. Do you know whose it is; did you ever see it before?

A. He told me while he was at my house it was a young lady's watch. I don't know how true that is.

Q. Did he have it?

A. Yes, sir.

(Watch is here introduced in evidence by the district attorney.)

Q. Did you take this chain that I hand you from his person?

A. Yes, sir.

Q. Do you know that?

A. Yes, sir.

Q. That belonged to him, did it?

A. Yes, sir.

Q. Did you know Sam Downing at that time?

A. No, sir; I did not, personally.

Q. Did you know of his going by any other name except Sam Downing?

40 A. The information was given to me as Sam Hickory, and I learned his name was Sam Downing.

Q. You swore out a writ for Sam Downing?

A. Yes, sir.

Q. When did you last see Wilson alive?

A. On Sunday morning.

Q. At what date?

A. I think it was on the 20th.

Q. Of what month?

A. Of September.

Q. Sunday morning before he was killed?

A. Yes, sir.

Q. September of 1891, then?

A. Yes, sir.

Q. Do you know what he was intending to do then?

A. Yes, sir; he was riding marshal, and he came to my house—he came up to go to my house, and I had moved my wife back to her mother's on account of her health; she was in very poor health, and I think that he went out to a man by the name of——

Q. Did you see him?

A. Yes, sir; I saw him and had a talk with him.

Q. Where?

A. At Tahlequah.

Q. When?

A. On Sunday morning, and on Saturday.

Q. Where was it his purpose to go then?

A. His purpose was to go for Sam Downing, or Sam Hickory.

Q. Going out to arrest him?

A. Yes, sir.

Q. Did he have a writ in his possession at that time?

A. Yes, sir.

Q. Now, then, when did you first learn that he was probably killed?

A. On Thursday afternoon.

Q. Go on now and state what occurred. From whom did you get your information.

A. I had been gone home, and came back to Tahlequah; I had heard there was a marshal killed on 14-mile Creek.

Q. Is that where Big Aleck lived?

A. Yes, sir; I believe that——

41 Q. Is that where Big Aleck lives?

A. Yes, sir; I believe that is what they call it—14-mile Creek—in that country. I went down to the office of Mr. Paschal; I told him I understood there was a marshal killed over there in that neighborhood, and he told me to go out and learn what there was about it, and I did so. I went up to the office to inquire around what marshal was killed.

Q. Let's cut that short. You got up a party, and you all went up there?

A. Yes, sir.

Q. You went up with a crowd that Mr. Paschal was with?

A. Yes, sir.

Q. Go on and state what you observed.

A. We went up there and we started in a house the first thing, I think, we done when we got there.

Q. Who did you find when you got there?

A. We found a man called Big Aleck, I think, was his name.

Q. Was that other Indian there?

A. He came in as soon as we got there.

Q. What was his name?

A. Jim Squirraw, or Squirrel.

Q. Go on and state what you observed there.

A. We found first, I think, we examined bullets that was shot around the house.

Q. State where they were.

A. There was one bullet hole through the corner of the porch post—the end of the post on the inside corner; shot through and struck the front door about a foot and a half to the right going in.

Q. To the right of what?

A. Struck the wall.

Q. Struck the wall about a foot and a half to the right of
42 the door as you go in?

A. We went into the house and examined the house then, and we found two bullet holes, and they come from the inside outwards to the front door.

Q. Passed through the door?

A. Yes, sir. Then on the middle door that goes through into the big room there was a glanced bullet shot about like this [indicating] ranging, going I should judge, about six or eight inches from the window that was around on the back side in the back room, and on the left wall, going through the same direction, there was another bullet mark.

Q. Anything else?

A. I noticed blood on the front-room floor, blood on the front door going outwards, on the outside.

Q. Blood on the front door?

A. Yes, sir; right below the bullet holes on the outside.

Q. Blood on the inside; in which room; in the back room or front room?

A. What I call the front room.

Q. You found some blood in there?

A. Yes, sir; I found what looked like blood stain all over the floor, different parts of the floor.

Q. In the back room, did you find any blood there?

A. In the back room, we found the floor had been turned over, and it looked as if it had been fresh sawed, and I saw where there was a new piece put in, a new piece of plank, and I asked through the interpreter——

Mr. BARNES. Who were you talking to?

A. I was talking to John Carey at the time.

THE DISTRICT ATTORNEY. Talking to John Carey?

43 A. He was the interpreter.

Q. Who were you talking to?

A. I asked the interpreter to ask Big Jim Squirrel how these pieces came in there.

Q. Did you take the piece out?

A. No, sir; I didn't.

Q. Did you see it taken out?

A. No, sir; I didn't see it taken out. I saw it after the floor was turned over, thought.

Q. What did you see?

A. I saw blood on the under side. It had the appearance of having been turned over—the old floor.

Q. Where did you find the old floor?

A. In the kitchen. The old floor was a big piece; the piece that was put in was next to the door—a short piece.

Q. How much blood did you find there?

A. I could not say how much; it looked like considerable.

Q. Then what did you find there after that; did you find any blood on the outsidr?

A. Yes, sir; we traced the blood from the back door by the spots. There was a piece if paper on the outside of the door; a little piece of paper, maybe a couple of three inches long, with a 'pot of blood on it, and we traced the blood from there then, by little spots, to where the body lay, or where they said the body had lain.

Q. Where was that?

A. That was about eight feet from the little smokehouse, I think.

Q. How far from the house?

A. I should judge about 20 feet.

Q. Do you know where the wagon set?

A. No, sir; I didn't see the wagon; I don't remember anything about the wagon at all any more than after I came back before we put the body in.

44 Q. Then what?

A. We saw a pile of ashes—a little pile—out by the smokehouse, and I think John Carey and James Anderson both told me there was a pool of blood there——

Q. Never mind that if you didn't see it yourself.

A. It had the appearance of being blood burned there.

Q. Did you move the ashes?

A. I moved them with my foot; took my boot like this, and moved them; it had the appearance of being blood there, burned.

Q. Now, then, go on and state when you found the body.

A. Well, Mr. Paschal had got Jim Squirrel——

Q. That is the Indian with the long hair?

A. Yes, sir; he got him to say that he would go with us to help find this body, and after they had all mounted their horses—I think Mr. Paschal and I were the lastr ones to mount—Jim backed out from going, and went and set down, and we asked him if he wasn't going with us, and he said, "No; that he hadn't killed no marshal, and he was not going to help hunt him."

Mr. BARNES. Was he talking English?

A. No, sir; through an interpreter.

The DISTRICT ATTORNEY. Go ahead.

A. I believe he asked him if he was going to back out, and the reply I can't swear to that he made, but, anyhow, he went with us—with Mr. Paschal and I—and he followed around the fence; there was a field in west of the house—a little field—and I think it had corn in it, and there was a road went around the right of the field, and went up into the clearing—that is, a windstorm had gone through and blown down the trees,

45 and he took a straight shoot up through that open space and got to the end of it and turned and came right straight back near to the fence, and came right back into the edge of the bushes, the opening of the road, and Mr. Paschal said to me, "Maybe he will lead us to the body," and I says, "Perhaps he will, but I think the body is in an opposite direction," just like that, and he went back to the house—he didn't go back to the house; rather, we went down to where the other men were bunched up in a group. We rode down there; Mr. Paschal, I think, footed it all the time, but I was riding, leading his horse.

Q. He walked?

A. Yes, sir; with his Winchester on his arm. And we went down to where the group of men were gathered together there.

Q. What did you find there?

A. And they told us that the horse was laying down below. Mr. Paschal and I then rode down to where the horse was laying.

Q. What did you find there?

A. I got down and examined the horse, and found that he was shot in the right knee.

Q. Whose horse was it?

A. Joseph Wilson's horse.

Q. You knew it, did you?

A. Yes, sir. He bought it right there at my house.

Q. You found it was shot where?

A. In the right knee. I walked to his head, and I found his throat had been cut plum' up to right back of the jawbone—right down this way—clear to the end.

Q. Did you see any blood there where he had bled?

46 A. Yes, sir; I saw blood; it looked as though the horse had been standing up and had bled over the ravine, run down the ravine and dropped after he got so weak he could not stand any longer. That is the way it looked to be.

Q That was Wilson's horse?

A. Yes, sir.

Q. Any bridle or saddle on him?

A. No, sir.

Q. Have you ever come across Wilson's saddle and bridle since?

A. No, sir.

Q. You found the horse there with its throat cut and without any saddle or bridle, and you have heard nothing of the bridle or saddle since that time. What next did you discover? Where did you go from there?

A. We divided up then into squads—three or four—or perhaps maybe more in a squad. I don't know exactly how they were divided up, but in my squad there was myself, and James Anderson, and George Harlow.

Q. Three in yours?

A. Yes, sir. I don't know the points of the compass there——

Q. Well, say that the house faces south.

A. We rode southwest, or south, if the house faces to the south. I don't know whether the house faces to the south or not.

Q. Where was the horse found—in what direction?

A. A little to the west of north, if the house stands facing south.

Q. A little north of west?

A. That would be my understanding.

Q. You found the body in what direction?

A. Northeast.

47 Q. Go ahead. You started out to hunt the body. Go on and state what you observed as you went along.

A. An agreement was made if the body was found that a shot should be fired as a signal that the body was found. I think we rode something like a couple of hours backwards and forwards, and we taken the ravines

on the south and west and back to the west over the hill and down into another ravine to the west and north, and then north of the house back northeast of the house. Then Mr. Harlow left us there, and Mr. Anderson and I came up going northeast and east of the house—that is, provided that the house stands to the south. We came up there and we saw where there had been some bushes cut along on the side of the road, on the left-hand side going that way [indicating] and on the right-hand side of the road there had been where a horse or horses hitched, one or two it looked like anyway; one horse had been hitched that morning; it was fresh. And Mr. Anderson pointed to the bush to me, as I was looking on the other side, and he said, "There is where a horse has stood." We rode into the house again. This was the second time we had been to the house. Mr. Clarke and Mr. Harnage was there, and we went down to show Mr. Clarke and Mr. Harnage the horse, and then there was a signal fired before we got there, and we started for the signal, or the direction that the shot had come from, the direction we could hear the pistol. We got up on the hill, the rest of the group had come, and they had found the track then.

Q. What kind of a track; a wagon track?

A. Yes, sir; a wagon track. The signal proved to be false. I think one of them had shot at a turkey. And we came back to go to that track, and when we came back to go to that track we heard two more
48 shots, and then we went right for those shots, and found them grouped up; we rode up to the group, and Mr. Paris pointed down over the hill like that, and Mr. Paschel and I went to the body, and Mr. Anderson followed me, and we took these pap'rs off of him.

Q. Where did you find the body? What kind of a place was it?

A. It was in a ravine on the side of a hill leading down into a ravine, and I think northeast of the house.

Q. How deep a ravine was it? Describe it as near as you can.

A. The ravine was pretty deep; I should say that if it was straight up and down it would be 30 feet, but being on a slant it would naturally be more.

Q. Had the body gone clear down to the bottom of the ravine?

A. No, sir; it might be ten or fifteen feet form the top and lay against a little bush with the right arm this way [placing arm under back], and the left arm this way [laying across breast]. The head was thrown back like this [indicating by throwing head back straight].

Q. Was he laying up and down the hill?

A. No, sir; he way laying lengthways of the hill.

Q. Crossways?

A. Yes, sir.

Q. How were his clothing? Were they pulled up, or anything of the kind?

A. No, sir; they were not pulled up. The vest over this side was perfectly straight, and his pants straight, and he had on a pair of boots and one spur, with the pockets of the pants turned outwards—that is, the right-hand pocket of his pants was turned out; I am not positive about any more pockets, whether any more pockets were turned out or not, but I am sure of the right-hand pocket being turned out.

49 Q. Was he dead?

A. Yesk, sir.

Q. What wounds did he have on him, if you observed them?

A. The hair was off on the top of his head, here on top, with a crack running down the skull.

Q. How was it behind here?

A. I didn't observe that until after I had picked him ip.

Q. I do not care when you observed it; it does not make any particular difference when you observed it?

A. There was a hole crushed in the back of his head here [indicating on back part of the head at about base of skull].

Q. You mean it was crushed in at the base of the skull?

A. Yes, sir.

Q. The crack run from the wound on top to the back of the head?

A. Yes, sir.

Q. I suppose you took the body back?

A. Yes, sir.

Q. Who remained there while the wagon was gone for?

A. James Anderson and myself and Sunday Christie.

Q. You remained there until they brought the wagon there?

A. Yes, sir.

Q. Did you see the wagon track?

A. Yes, sir; we come up and back tracked on to the main track where it looked as though it came from the house down, and then we went back in a different direction from the house; we left the house to the left.

Q. You did not go the house when they got the wagon and wagon cover?

A. No, sir; I staid down at the body.

Q. Did you see an axe there?

A. No, sir; I did not.

Q. That was not found while you were there?

A. No, sir.

50 Q. You took the body where?

A. To Lucky's Mill. I built a box for him that night and put him in it.

Q. Did he have any pistol or any weapons upon him?

A. No, sir.

Q. Did he before his death?

A. Yes, sir; he had a white-handled pistol. He changed the handles on his pistol at my house.

Q. Did he have that pistol when you found him dead?

A. No, sir.

Q. The pistol, saddle, and bridle were gone?

A. Yes, sir.

Q. And the right-hand pocket you say turned inside out?

A. Yes, sir.

Q. And the skull crushed in in the manner you have stated?

A. Yes, sir.

Q. Did you observe the wagon sheet before the body was put on it?

A. Yes, sir.

Q. Was there blood on it?

A. Yes, sir.

Q. How much?

A. I think there was two spots of blood, it might have been the size of an old-fashioned copper cent, or a little bigger, that I observed.

Q. Did you look after opening it out?

A. No, sir.

Mr. BARNES (of counsel for defendants.) I understand from these defendants that they have never been served with the intention of the Government to use this party who is now testifying as a witness. His name is not on the indictment. I have examined all the notices served upon the defendants and his name is not among them. I have seen the clerk of the court, and I can show by him that he finds no record showing that they were ever served with notice.

The COURT. It is too late now.

Mr. BARNES (of counsel for defendants.) I want to save the
51 point.

The DISTRICT ATTORNEY. It was served upon him, I think, if your honor please.

Mr. BARNES (of counsel for defendants). I think not.

The COURT. The point is overruled because it comes too late. The objection must be made before the examination of the witness.

Mr. BARNES (of counsel for defendants). The examination is now in progress, and we never discovered it before this time.

Cross-examination by Mr. THOMAS H. BARNES:

Q. Did you find any other papers on the body of this man than you have been asked about; did you find a receipt signed by Mr. Edmiston, a lawyer at Muskogee?

A. Yes, sir; I think I did.

Q. What was that for.

A. I am not positive what it was for. I remember seeing Mr. Edmiston's name on the paper.

Q. You don't know what the body of it was?

A. I did know at the time; I don't know now. I cast it to one side, and I do not remember them, only the receipt of Mr. Patrick's and the one I wrote. There was a lead pencil found there that was my lead pencil.

The DISTRICT ATTORNEY. I forgot to ask him about that.

Mr. BARNES (of counsel for defendants). I make the point that if any of these papers are introduced they ought all to go in. I offer now
52 to introduce this paper also. I think it fair that all papers should go in.

The DISTRICT ATTORNEY. I have no objection to it.

The COURT. Let it go in then.

(The paper referred to was here read to the jury, and is as follows:)

"M. M. Edmiston, attorney at law, pension agent; prompt attention given collections. Muscogee, I. T., Oct. 18, 1890. Now, on this day J. S. Wilson having paid M. M. Edmiston ten dollars ($10.00), a fee to defend him before U. S. Commissioner Nelson, this is to receipt him, the said Wilson in full, for all claims due me or to become due to date. And a certain bill of sale given me by said J. S. Wilson to secure the payment of said ten dollars is hereby cancelled and held for naught. Said bill of

sale or mortgage was upon a cotton crop of Wilson's. Said cotton crop is hereby released, the same being west of Bragg's Station, on J. B. Patrick's place. (Signed) M. M. Edmiston."

The WITNESS. Yes, sir; that paper was found with the body at the time.

The DISTRICT ATTORNEY. I will also introduce this letter, dated Braggs, Indian Territory, September 11, 1891, addressed to "Dearest One," and signed by "Your true friend, Jennie H."

I also introduce a letter dated Tahlequah, I. T., August 2d, 1891, addressed to Mr. Josirah Poboy, and signed by J. T. Orchard.

The WITNESS. That was James Orchard above us. I knew him well.

The DISTRICT ATTORNEY. And then inside of the pocketbook I find two registered letter notices, "Re*ig*stry return sheet, sent 10, 4, 1890. Registered letter No. 21. Addressed to Humphrey Frederick &
53 R., and signed by C. J. Frederick." The other is "Registry return sheet, sent 2, 14, 1891. Register No. 39. From Braggs to The Washington Detective Agency, and signed by the Washington Detective Agency, by S. J. Kellogg, secretary." I also int*or*duce this lead pencil.

Mr. BARNES (of counsel for defendants). How long had you been riding with Mr. Wilson?

A. I had been riding with him off and on from July.

Q. From July up to the time of the killing?

A. Yes, sir; I lived at Tahlequah at that time.

Q. Have you ever had any experience with wounds, or seen people when they were wounded much?

A. Yes, sir; I have seen people who were wounded.

Q. I reckon you never wounded any?

A. No, sir.

Q. Do you claim to have made any close or critical examination of the wounds of this man?

A. I saw these wounds, as I say, before I picked him up, and afterwards as we turned him over I discovered the other wounds.

Q. Wasn't his shirt pulled up in such a way you could not see that wound on his body before you picked him up? Which wound was it you saw before you picked him up?

A. This wound here. He was lying on a little knoll, like, over the roots of a tree, and the stuff that had washed down from the hill, like, and the head was hanging about that far [indicating about six inches] from the ground.

Q. Who was with you?

A. There was Ridge Paschal and James Anderson——

Q. Who was immediately present when you came to the body?

54 A. That is what I am talking about; there was ten or fifteen men there.

Q. Was Ridge Paschal immediately present when you found the body?

A. Yes, sir; when I came to the body, he was immediately present with me.

Q. You say his body was laying lengthwise. Wasn't in the gulch—at the head of the gulch?

A. I don't know what you call the gulch.

Q. The draw, then, right out from the hill—the ravine?

A. The ravine run the same way the body was laying.
Q. Then the body was len'thways of the ravine?
A. Yes, sir.
Q. The ravine must have run across the hill, like?
A. No, sir; it run len'thways, the same way the hill was running.
Q. The ravine was down from the brow of the hill, of course?
A. Yes, sir.
Q. Did you see where he had been thrown over the top of the hill?
A. Yes, sir.
Q. How far from the top of the hill?
A. I should judge about 15 feet.
Q. Wasn't it 25 or 30 yards?
A. I wouldn't swear to anything I didn't believe.
Q. When I suggested 25 or 30 yards, although you said it was 15 feet, it seems to create quite a doubt in your mind.
A. No, sir; it don't raise any doubt in my mind.
Q. It seems to shake you on the fifteen-foot proposition. How is that?
55 A. It doesn't shake me a bit. I should judge it was 15 feet.
Q. You say, then, it was 15 feet?
A. I don't say it was that exactly.
Q. Was it over 20 feet?
A. I wouldn't say, because I didn't measure it.
Q. Then you will go back to the original proposition, that according to the best of your judgment it was 15 feet?
A. I said I should judge it would be about 15 feet.
Q. Wouldn't that be your best judgment? You gave your best judgment to the jury when you called it that. This seam or mark, whatever it was, this opening up here, it wasn't anything only just the seam of the skull, was it?
A. Yes, sir; the skull was bare, and it was cracked.
Q. Could you have laid your finger in it?
A. No, sir.
Q. Could you have laid this pencil in it?
A. No, sir.
Q. If it was cracked, it wasn't split, I reckon?
A. A crack ain't a split.
Q. Then you don't want the jury to understand from your statement that that crack was made from being cut open?
A. I should not say it was cut.
Q. Do you know how the seams run in a man's skull along about that place?
A. No, sir; I don't know anything about the seams in a man's skull.
Q. Back here there was a place where the skull had been knocked in, not cut in, but knocked in?
A. Crushed in.
Q. Put your hand on your head where you say that was.
A. I think it was right here [indicating at base of skull].
56 Q. It is about where the spinal column connects with this part of the head. It is just below this large lump on the back on the head, is it?

A. I don't know how the spinal column ranges.
Q. What day was this?
A. It was on Friday afternoon.
Q. The body was considerably decomposed, wasn't it?
A. The mouth and nose and face was, and the body was swelled considerable.
Q. It was offensive to the smell?
A. Yes, sir.
Q. It was warm in September?
A. Yes, sir.
Q. About as warm as it is now, wasn't it?
A. Not quite as warm as it is now.
Q. Don't you remember of the hot winds blowing over the prairie about that time of the year, and you could not hardly get your breath?
A. I don't remember about that.
Q. You have those hot winds up in that country through the summer?
A. We have warm weather.
Q. You have hot winds in September, don't you, sometime?
A. I could not say about that.
Q. That isn't much further north than this, is it?
A. 105 or 110 miles.
Q. How far is it from here to Tahlequah?
A. It is about 95 miles, I think.
Q. It is not due north, is it?
A. I could not tell you whether it was due north or not.
Q. Well, anyway, it was warm weather in September?
A. Yes, sir.
57 Q. The body was in a bad condition?
A. Yes, sir.
Q. You didn't make any critical examination of the wounds. You just looked at them—you just looked at the man as he lay there. Was the shirt up over this wound in his breast?
A. We opened his shirt that night when we got to the mill to show ladies where he was shot—at Mr. Luckey's mill. The wound was about two inches below the right nipple.
Q. A big hole?
A. It looked like a bullet hole.
Q. Which way did it range—through the body, or towards the left; come out to the left of the spine or the right, which?
A. I was at the examination of the doctors, and I have a statement, and if you want that I will give it to you.
The DISTRICT ATTORNEY. Have you a statement signed by them?
A. I took it down as the doctors told me.
Mr. BARNES (of counsel for defendants). What doctors were they?
A. Doctor Thompson and Doctor Blake.
Q. You took down a memoranda of what they stated?
A. Yes, sir.
The DISTRICT ATTORNEY. If it was not signed by them it is not competent.
The WITNESS. I took it down just as they gave it to me at the time.

Mr. BARNES (of counsel for defendants). "Struck two inches below the right nipple." That is what you say?

A. Yes, sir.

Q. Did that ball go clear through the body?

A. Yes, sir.

Q. How far from the spinal column did it go?

A. It came out at the lower edge of the right shoulder blade,
58 straight through, but I didn't measure that.

Q. It was pretty near to the spinal column, was it not?

A. I would say it was about the same distance, or a little further, from the spinal column.

Q. Didn't it go nearly straight through the man?

A. Yes, sir; I would say that it went straight through. I took hold of the probe, and I should say it went straight through.

Q. What ever made this place here on the back of the head was a blunt instrument of some kind; it wasn't the sharp edge of something, but the blunt part of something, either of a rock or an ax, something of that sort?

A. Yes, sir; I should think it was.

Q. How could you tell if blood had been burned by fire, if fire had burned it up, how could you tell what was burned?

A. I didn't say it was; I said it looked like it.

Q. You would not say you could tell whether it was blood or not, only that it looked like it?

A. No, sir.

Q. There had been a fire there, and it would be very hard to tell if it was blood after it had been covered with fire, wouldn't it?

A. I would like to explain a little if you would let me and I am allowed to.

Q. You are allowed to tell anything you observed; if you know there was a pool of blood there and there was a fire burnt over it, you can explain it, but if you are going to tell some talk we don't want that; just tell what you saw.

A. The ground where the little pile of ashes was was different
59 from what you would put water on, or anything else. It was of a reddish cast.

Q. What kind of soils was that?

A. Black, of a sandy nature.

Q. A kind of a sandy loam, pretty good wheat land?

A. No, sir; it didn't have that appearance.

Q. It was sandy?

A. Yes, sir; and from the looks of the ground it looked as if something had been burned there that ought not to have been.

Q. That is the nearest you could come to telling it?

A. I have other things back of that to cause me to still believe it was blood.

Q. You are only to tell what you observed there. Where was that with reference to a tree that was there?

A. That was about eight feet from the corner of the smokehouse or maybe a little further.

Q. Was there a 'treet there that the wagon had stood under?

A. I am not positive about that wagon.

Q. Do you know which way that house faces?

A. I think the house faces south; I am not certain.

Q. You don't know whether that house sets with the point to the compass or not?

A. No, sir; I don't know the range of the country at all.

Q. If the house faced south, how would the smokehouse be?

A. I should say the smokehouse faced west.

The DISTRICT ATTORNEY. That would make the smokehouse point towards the house?

A. Yes, sir.

Q. The smokehouse is a little southeast of the house?

A. Yes, sir.

60 Mr. BARNES (of counsel for defendants). Would the smokehouse be north of an east line from the corner of the porch, or would it be south of that?

A. How is that?

Q. Which way was the smokehouse from the front of the house, or from the porch?

A. At the southeast corner of the porch.

Q. Stood out from the southeast corner of the porch?

A. Yes, sir; that is provided the house stood south.

Q. You say the blood was about eight feet from the corner of the smokehouse; which corner?

A. The southwest corner.

The DISTRICT ATTORNEY. Suppose you stand on the porch and look south. Would the smokehouse be to your right hand or left?

A. The smokehouse would be at my left.

Mr. BARNES (of counsel for defendants). Did you notice a wagon there?

A. I don't remember anything about a wagon at all only when it came after the body.

Q. You didn't seen the wagon before that time that you remember?

A. No, sir; I may have seen it, but I don't remember it.

Redirect examination:

The DISTRICT ATTORNEY. Do you know where this lead pencil was found.

A. It was found within about five feet, I should say, from the top of the level surface on the hill, coming down towards the body.

Q. Do you know the pencil?

A. Yes, sir.

Q. Whose is it?

A. It was mine. I lent it to Jo Wilson, and he loaned me a fountain pen in return. It is an indellible lead pencil.

61 JAY CLARK, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. What is your name?

Ans. Jay Clark.

Q. Are you a Cherokee or a white man?

Ans. A Cherokee.

Q. Where do you live?

Ans. At Tahlequah.

Q. Did you know Joseph Wilson in his lifetime?

Ans. No, sir; I wasn't acquainted with him.

Q. Do you know these defendants?

Ans. I am acquained with Shade.

[Witness points to one of the defendants, who he says is Shade.]

Q. Were you out helping to hunt Wilson, the deputy marshal, who is alleged to have been killed by these men?

A. Yes, sir.

Q. You may go on and state what you did and all you found and all about it.

Q. The first thing I saw was some blood about the place.

Q. What day did you go out?

A. I could not say positively what day it was.

Q. You went out when Mr. Paschal went out?

A. Yes, sir; when the body was found; I don't remember the date.

Q. You first went where, to the house?

A. Yes, sir; to the house, where it was said Big Aleck lived. I never was at the place before.

Q. What did you find?

A. We found some blood.

Q. Where did you find the blood?

62 A. It was out from the house a little ways, between the wagon and the old house.

Q. Between the wagon and the smokehouse?

A. Yes, sir; a splotch on the ground between the wagon and the smokehouse.

Q. How far was the wagon from the smokehouse?

A. I could not say exactly.

Q. About how far would you say?

A. I reckon some maybe eight steps. I don't know just exactly.

Q. How much blood did you see there?

A. There was a splotch about that big [indicating a space about four inches in diameter].

Q. You found that on the ground out there?

A. Yes, sir.

Q. Did you find any other blood there?

A. There was some blood on the wagon.

Q. How much did you find on the wagon?

A. There was some few splotches on the inside of the wagon box.

Q. Was the wagon bed on?

A. Yes, sir; and there was some on the brake and on the running gears.

Q. In the inside of the bed?

A. There was a little in there, not a very big splotch inside.

Q. Just go on and state what you found after that.

A. We saw some on the wagon sheet. I believe Ridge Paschal went to get something to wrap the dead man up in.

Q. Did you find any blood in or about the house?

A. Yes, sir; Mr. Harnage, I believe it was, turned the floor over.

Q. In which room?

A. In the side room.

Q. The back room?

A. Yes, sir; there was some blood on that floor after he turned it over.

Q. The planks were turned upside down, and then he turned them up, and there was blood on them?

A. Yes, sir.

63 Q. How much blood did you find in the house?

A. That was all that I saw in the house.

Q. Did you find any more on the outside; did you observe any more?

A. No, sir.

Q. Now, then, what did you do towards hunting the body; go on and state that?

A. I went there with Mr. Harnage. We got there after Mr. Paschal and them had been there. They were off making a search, and we stayed there until they came back, and then we went to search for him. We all divided up and went off some distance, and came back to the house, and me and some of the boys, I don't remember who it was, was sitting at the house, when we heard a shot fire for a signal. Whoever found the body was to fire a signal, and we went over there then. I didn't go to the body.

Q. Did you see it?

A. I saw it off a little distance. I started to it, and the wind changed, and it was very offensive.

Q. Did you see any wagon tracks there?

A. Yes, sir; the boys were talking about a wagon track; they tracked a wagon out where it came back, and we took a track that came from the house. We went back to the house, and went that wagon track.

Q. Where did it go to?

A. It went back to the house.

Q. Whereabouts there?

A. I never noticed after it got to the yard there.

Q. It went up to Big Aleck's house?

A. Yes, sir; that is the last I noticed of it after it got to the yard there.

Q. That is the track that led to the body?

64 A. Yes, sir; right on the brink of the hill.

Q. Was either one of these defendants there when you got there?

A. No, sir.

Q. Do you know what become of them?

A. No, sir.

Q. Did you know at that time Hickory, the defendant here?

A. I don't know that I did; I had seen him, I reckon, but then I had no acquaintance with him.

Q. Did you see the horse that was found?

A. No, sir; I didn't see that.

Q. You speak about a wagon sheet. How much blood was on the wagon sheet?

A. I could not say exactly; there was several spots of blood. Judge Paschal held it up; I didn't examine it very closely myself; Judge Paschal and somebody else was examining it.

Q. Where was the wagon sheet found?

A. I reckon they got it in the house.

Q. Which one of the houses?

A. The main house, in the front room, coming from the front of the door when I saw him, coming out on the porch.

Q. Did you see the ax?

A. No, sir.

Q. Did you observe the location of the doors and windows in this house?

A. Yes, sir.

Q. Describe that to us.

A. The door leading into the front room was about the center of the wall. There was a door that went into the side room that was near up in the corner.

Q. Off to the left as you go in?

A. Yes, sir; it wasn't in the center. There is a window in the room about the center of the room.

65 Q. Where is the door in the side room?

A. It is in the end of the room, in the east end.

Q. Is that all the doors there are, those three?

A. Yes, sir; all I saw.

Q. Which way does the front door open as you go in, to the right or left?

A. I think it swings to the right as you go in.

Q. Which way does it swing as you go through the hall into the other room?

A. I beoieve it swings to the right out this way as you go in.

Q. Which way does the door swing as you go out of the kitchen or back room?

A. I couldn't say about that; I don't know whether there was any door to it or not.

Q. Did you notice any bullet holes there?

A. I saw two bullet holes. There was two bullet holes in the front door.

Q. Which way did they go?

A. They went out. One struck the edge of the porch and went under the edge.

Q. Where did the other one go?

A. It went, I reckon, from the way it *way it* went, through the plank.

Q. Those two went out of the door?

A. Yes, sir.

Q. Did you see any other bullet holes?

A. There was one that kind of glanced on the door, that went into the side room. It went into the wall of the side room; it seems to me it was on the west corner, but I won't be positive. There was another one that went through, as well as I remember, between the window and the corner of the side room.

66 Q. Nearer the window?

A. I could not say; somewheres to the west of the window.

Q. Did you see any other bullet holes?

A. There was one in the post of the porch.

Q. Which post?
A. I believe it was the corner post.
Q. The left-hand corner as you go out of the house?
A. Yes, sir.
Q. Where did that ball go?
A. It struck the wall to the right of the door.
Q. Is that all the bullet holes you saw?
A. Yes, sir.
Q. That is five? Standing at the window in the back room, can you look through the center door and see the front door?
A. No, sir; not unless you peep around considerable.
Q. Is this diagram made about right?
A. Yes, sir; Mr. Harnage and me was noticing that when we were there.
Q. Are there any other windows in the room?
A. None that I know of.
Q. Is there any windows in this room [indicating on diagram]?
A. No, sir.
Q. No windows in the front room?
A. I don't remember whether there was or not. I could not say.
Q. You talk Cherokee, do you not?
A. Yes, sir; I talk some.
Q. Who did you find at the house when you got there?
A. When I first went there there was no one there except old man Aleck.
Q. Big Aleck, he is called?
A. Yes, sir.
Q. Do you know John Squirrel, the other old fellow, or Jim, it is?
A. Yes, sir; I know him now.
Q. Was he there?
67 A. He came there after we had been there. I think he was out with Judge Paschal.
Q. Did you do any interpreting?
A. We was setting there, and me and Big Aleck had a little talk, and every once in a while I would tell Mr. Harnage what Big Aleck was saying.
Q. You did tell these men what Big Aleck said, then?
A. They were not present when me and Big Aleck was talking. John Carey done the interpreting for Paschal.

Cross-examination by Mr. THOMAS H. BARNES (of counsel for defendants):

How far is it from the house to where the body was found?
A. I don't know exactly. It was a mile, or probably a mile and a half.
Q. What direction?
A. It was northeast.
Q. Did you live in that part of the country?
A. Yes, sir; I lived at Tahlequah; I was raised in that district.
Q. How far did you live from this place?
A. It was about 18 or 20 miles from where I lived, I reckon. I had been over that country a great deal. That is the first time I was ever right at that place.

Q. Is the country rough there?
A. Yes, sir; it was pretty rough.
Q. It is rough from where you started to the house going to the place where this body was found, isn't ?
A. It wasn't so very rough in there from Aleck's to that place.
Q. Rocky?
A. Between the house and that place there might have been a few rocks; I guess there was; I don't remember.
Q. There was no wagon road; just a trail, wasn't it?
68 A. I don't remember whether there was any trail or not; part of the way there was no road at all—the biggest part of the way.
Q. How far is that place from Tahlequah?
A. I believe it is called fifteen miles. It is called twelve miles Luckey's Mill, and three miles from the mill over to that place.
Q. You talked to Aleck there, you say?
A. Yes, sir.
Q. Did you talk to Jim any?
A. No, sir; he was talking to Aleck when he came back, and I suppose I spoke a word or two with him; I didn't talk very much; he came back with Judge Paschal when the crowd came in.

69 JOHN CAREY, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. State your name.
A. John Carey.
Q. Where do you live.
A. In Cherokee Nation, Tahlequah district.
Q. How far do you live from Tahlequah?
A. About fifteee miles, I reckon.
Q. How far do you live from Big Aleck's, where this killing is said to have occurred?
A. I suppose it is about four miles; something about that, I guess.
Q. How far does Big Aleck live from Tahlequah?
A. I expect it is about the same distance.
Q. He lives in the Cherokee Nation?
A. Yes, sir; in the same district I do.
Q. Did you know Joseph Wilson in his lifetime, the man who is said to have been killed up there?
Q. I got acquainted with him the time that he came to my house.
Q. When was that?
A. The 22d of last September.
Q. You are a Cherokee, are you not?
A. Yes, sir.
Q. What day of the week was it that he came to your house?
A. On Tuesday.
Q. What time of the day did he come to your house?
70 A. It was before 12 o'clock; before dinner.
Q. About eleven or twelve?
A. Yes, sir; I expect about eleven o'clock.
Q. What was his business?

A. He came up and spoke to me, and called me by my name, and said "Howd'ye John," and I spoke to him, and told him to get down, and he got down and he set down and he asked me what did I know about Sam. about the whiskey he had him charged with. He had a warrant for Sam

Q. Sam who?

A. Sam Hickory.

Q. That is this defendant?

A. Yes, sir; that is him sitting over there. I told him I didn't know anything about Sam having any whiskey. He says "You and Aaron Carey is witnesses in the case," and I told him he might be mistaken in names, and he says "Your name is John Hair, isn't it?" and I told him no, that that wasn't my name, and he said he was mistaken in my name then, and I told him my name was John Carey.

Q. Where did John Hair live?

A. He asked me where he lived, and I told him about four miles over on Double Springs Creek, where his daddy stayed, I told him.

The DISTRICT ATTORNEY: This subpœna which has been introduced in evidence, shows that John Hair and Aaron Carey were witnesses.

Q. He said he was mistaken, and you told him where Hair lived?

71 A. Yes, sir; and he said the reason he thought I was John Hair there was an old man across the creek who couldn't talk English, and he asked him where John Hair lived, and he pointed right on straight across towards my house, and he asked him if it was the first house, and he nodded his head yes.

Q. If he said where he was going and what he was going to do, state that.

A. He asked me where Sam Hickory stayed—where he lived.

Q. Did you tell him?

A. I told him I thought he stayed at Big Aleck's; Aleck Stocks.

Q. Did he stay there?

A. Yes, sir; I think he stayed there.

Q. Go ahead.

A. What makes me think so, my brother had told me that Sam was over there, and——

Q. I don't care anything about that. He stayed at Big Aleck's?

A. Yes, sir.

Q. Then what?

A. He said for me to go with him, and show him the way up there.

Q. Did he tell you whether he had a writ for Sam or not?

A. Yes, sir; he said he had a writ for him.

Q. Did he show you the writ?

A. No, sir.

Q. Was he riding or walking?

A. He was riding.

Q. What was he riding?

A. Horseback.

Q. What kind of a horse?

A. It was a dark bay horse.

72 Q. Did he have any coat on?

A. No, sir; not on his body; he just had a vest on, and in his shirt sleeves.

Q. Where was his coat?

A. He had his coat on his saddle.

Q. He asked you to go with him and show him the way; did you consent?

A. I told him I would be afraid to go with him to show him the way on account of my neighbors wouldn't like it, maybe be mad at me about it. He said then just to go so far with him that he would not get lost from the place; show him so he could get to the place, and he could know Sam. And after din'er me and him went.

Q. How did you go?

A. I went horseback.

Q. Now, then, go on and state how far you went.

A. I went with him close to Big Aleck's, about a quarter from the house.

Q. Why didn't you go all the way?

A. When I got within a quarter of the place he was riding ahead of me, and I suppose he seen Sam on ahead, and he said, "Who is that a coming?" and I looked around and turned my horse off to the right, and I looked, a and it was Aleck Stock. I told Wilson it was Aleck Stock, the man who lived there, and we turned out of the road on the right-hand side, and after we thought Aleck Stock had gone out of sight; he was not coming the road we were in; he was coming straight on this way,
73 and we got back into the road, and I told him just exactly how far the house was, and it was about a quarter, I reckon, and how to get to the place; how the house was; there was a road going in from this way, and there was a little road he could go into right up to the corner of the fence at the house. He said that maybe Sam might not be there, and he asked me who lived at the other side of Aleck's, and I told him Hawkins, and he said if Sam wasn't there he would inquire for Hawkins, and go on, and he would come into the middle road, and come back on the creek again; if he found Sam, after he arrested him he would fire his pistol off to notify me that he had arrested him, so I could come on down and meet him close to Brown's on the prairie.

Q. Then he left, did he?

A. Yes, sir; and went on towards the house.

Q. Then what?

A. I went right straight across to the edge of where a cyclone had passed through.

Q. How far from the house?

A. I guess it was over a quarter from the house.

Q. Then what?

A. I stayed there, I reckon, about half an hour, maybe not quite so long, and I heard a gun fire', kind of a pistol, or something. It fired, and you could have made two or three steps before there was two right together, nearly together, fired. I was riding along then, and they kept shooting for a little time.

Q. Then the other guns were fired off slow? How many other
74 guns were fired?

A. I could not say exactly how many; but then there must have been about five or six shot.

Q. After the first three?

A. They were all of them, I expect, about that. I could not say how many exactly, but the last shot that was fired was what I thought was a rifle gun. It went off keen. I didn't know the direction, whether it was close to the house, or some other way. I thought at the same time that Jo had met somebody there, and was going on, and I rode on around to where*h* he said he would meet me, and I came there, and waited until sundown and he never came.

Q. About what time was it when this shooting occurred; about how high was the sun?

A. The sun was way up high. I couldn't say exactly what time.

Q. About how long did you wait after the shooting was over?

A. I waited a good while for him.

Q. About how long, an hour or two?

A. I must have waited about an hour and a half, something like that. I thought maybe he had passed on, and might have rode faster than me, and I went to Brown's and asked if anybody came; they lived right on the road, and Mrs. Brown said she had not seen anybody, and I waited on till sundown.

Q. What did you do then?

A. Came on down to Squirrel Carey's, and we talked about it, and I told him about how the man had went on, and also that I had heard some shooting up there. He was to fire off his pistol, but he didn't say how many times.

Q. That was on Tuesday, was it?

A. Yes, sir; on Tuesday.

75 Q. Was that your brother's house you went to?

A. Yes, sir; while we were there talking about it Ely Baldridge and Steve Carey came up.

Q. And then you all went up, did you?

A. Yes, sir; we went up to Aleck's.

Q. That same night?

A. Yes, sir.

Q. Where did you go to?

A. Went to Aleck's.

Q. What did you see there?

A. We went to Aleck's, came up to the new house, the first house—ther' is two houses there, and we came up to the new house. It was dark; there was no light, and we hollered was they asleep in Cherokee, and nobody answered. We hollered three or four times, and there was another little house, and we went there; thought they might be there, and there was a little light in there, about that big [indicating a small light], just a coal of fire. We hollered up there if they were asleep and nobody answered, and we came on back.

Q. Nobody answered at that house?

A. No, sir; nobody never answered.

Q. How far is that house from this other house where Aleck lives, the little house where you saw the light?

A. I guess it is about 75 yards, I reckon; maybe 100 yards.

Q. What direction?

A. It is north, I think.

Q. So you didn't find anybody there at all?

A. No, sir.
Q. You didn't go into the house?
A. No, sir; we never got off of our horses.
Q. That was Tuesday night?
A. Yes, sir.
Q. The same night of the shooting; the same night of the day
76 you heard this shooting?
A. Yes, sir; Tuesday night.
Q. Now, then; go on.
A. We come on back, and we said we would go up in the morning.
Q. You made arrangements to go up in the morning?
A. Yes, sir.
Q. Are you sure you went up the same night you heard the shooting, or was it in the next night?
A. It was Tuesday night.
Q. Did you go up there Wednesday morning again?
A. We went up Wednesday night again.
Q. You didn't go up Wednesday morning?
A. No, sir; wes started up there.
Q. You said you would go up in the morning, on Wednesday, but didn't go?
A. We started——
Q. Go ahead.
A. We went up next morning; we went on up, went be Harlow's, and he asked us where we were going——
Mr. BARNES (of counsel for defense). Never mind your conversations.
The DISTRICT ATTORNEY. Did you go away further than Harlow's that morning?
A. We went to the mill.
Q. How close is the mill?
A. About 3 miles, I reckon.
Q. Then what?
A. When we got there we were talking to——
Mr. BARNES (of counsel for defendants). Never mind your conversation.
The DISTRICT ATTORNEY. Did you go any further than the mill?
A. No, sir; a man named Charley came there and said——
Mr. BARNES (of counsel for defense). Never mind; I don't know what it is, but then I don't want any conversation.
The DISTRICT ATTORNEY. You learned something there that induced you not to go?
77 A. Yes, sir; I have to bring it around that way to get at it.
Q. What was it you learned?
A. A man named Charley sa'd there was a man on the prairie he thought was an officer.
Q. You thought that man was the man and you didn't go?
A. Yes, sir.
Q. That is the reason you didn't go any further?
A. Yes, sir; we came back home.
Q. You thought that man was Wilson?
A. Yes, sir.

Q. Then you came back home?

A. Yes, sir; that was Wednesday about 12:00 o'clock. In the evening I went down close to Tarplin's to get a cow and calf out on the prairie down there, and I got down there and found her, and was running around there until mighty near sundown, and I drove her and put her in Dick Carey's lot, and told him to keep her until I got somebody to help me to get her away.

Q. Then what?

A. I started on back and right around the house I met Neal Nugent and Joe Keener. I was going by Andy Hair's after my dog. I had a dog that run up there and I thought I would go by and get it; and I told Neel I was going there and he said that was his home road. We went to Andy Hair's and just as soon as we rode up there was a man named——

Mr. BARNES (of counsel for defendants). Never mind any conversation.

The DISTRICT ATTORNEY. You went to Andy Hair's; who was with you?

A. Neal Nugent.

Q. Was Joe Keener with you?

A. No, sir; he went to Carey's.

Q. What time in the day was that?

A. A little after sundown.

78 Q. From there did you go up to Big Aleck's?

A. Yes, sir; there is where we heard this man was laying there wounded.

Q. You heard that a man was laying up there wounded?

A. Yes, sir.

Mr. BARNES (of counsel for defendants). I object to this man giving conversations.

The DISTRICT ATTORNEY. I am trying to avoid it. I am trying to get the reason he went up there. (To the witness.) The reason you went up there, you learned at Hair's, there was a man laying there wounded?

A. Yes, sir.

Q. Who all went up?

A. Me and Neal went up by ourselves. Just rode right on that way. I said "Let's go up there."

Q. You learned this man was laying up there wounded at Big Aleck's, and you went up there?

A. Yes, sir.

Q. You and who went?

A. Me and Neal Nugent.

Q. What did you find up there when you got there?

A. Big Aleck and Jim.

Q. Where were they?

A. They were in that little house, the furtherst house.

Q. Were they in the house that you afterwards found the bullet holes in?

A. No, sir; they were in the furtherst house, the house north of that.

Q. Did you find anybody else there?

A. No, sir.

Q. Did you see the defendant's wife there that night?

A. No, sir; I never seen her there that night.

Q. They were not in the big house where the shooting occurred?

79 Q. No, sir; there was no light there, and we passed right on down and went up to the little house. When we went there we saw a light there, and we said we expected they had got him in there; they had a light in there.

Q. That is the same place you saw the light Tuesday night?

A. Yes, sir; a little fire.

Q. Did you make any inquiries as to whether the man who was wounded was there or not?

A. Yes, sir.

Q. You asked them if he was there?

A. Yes, sir; I asked Aleck that we heard there was a man wounded, and we came to see him and tend to him, and he said that he didn't know anything about it; he said there was nothing had been done on his place that he knew of.

Q. You learned that the wounded man wasn't there?

A. Yes, sir.

Q. What did you do when he told you that?

A. We just came on back.

Q. Go ahead.

A. We came on, and we said that looked awful curious——

Q. Never mind what you said. You got this information and you came back?

A. Yes, sir.

Q. Did you go back there again that night?

A. No, sir.

Q. When you came back what did you do?

A. The next day, on Thursday, I said I would go and get somebody and see about it.

Q. It was on Wednesday night you were there?

A. Yes, sir.

Q. Did you see Mr. Paschal, here, and talk with him about it?

A. That was Thursday evening I went and reported it to him. The Wednesday night we came home we came to Harlow's, and I told Neal to go down on the prairie and get as many as he could, and I
80 would go above, and we would all meet down at the edge of the prairie at eight o'clock.

Q. Did you do so?

A. Yes, sir; eight o'clock Thursday morning.

Q. Then where did you go?

A. I went up to Big Aleck's.

Q. What did you find there Thursday morning?

A. We came up, and the door was shut up; it wasn't open in the big house, or little house, and as soon as we rode up we seen where they had shot the post and door. We stood there on our horses, and directly the door opened and Big Aleck came out and spoke to us, "Howdy'e," that way, in Cherokee, and set down on a seat that was there at the side of the door, and he says, "You all come to see about this house where the shooting was," Aleck says, and we got down, and he commenced to show us, and says, "Here is one place, and here is another," and he took us all around.

Q. What shots did you find there. Tell all about it.

A. We found blood all around there.

Q. In the house?

A. Yes, sir; in the big house there was specks of blood.

Q. Specks of blood in the back room?

A. Yes, sir; there was blood on the door, outside of the door the biggest spot; there was other little specks of blood around in the back room.

Q. Specks of blood around in the back room?

A. Yes, sir.

Q. Blood on the front door?

A. Yes, sir.

Q. On the outside or inside?

A. Outside.

Q. Was there blood any place anywhere else?

A. There was blood in the yard around at little places, and then
81 off a piece there had been a pool of blood about that big [indicating].

Q. Out towards the smokehouse?

A. Yes, sir; on the right-hand side of the smokehouse.

Q. How about the back room?

A. There had been lots of blood in the back room.

Q. At the time you got there on Thursday, were there any boards turned upside down in the back room?

A. No, sir; there was short boards on the end of the floor next to the door in the room there; they were awful bloody that Thursday morning when we got there.

Q. Did you go back again when Mr. Paschal went?

A. Yes, sir.

Q. How was it then?

A. Then there boards were taken up and new boards had been put in there.

Q. These two short boards that were next to the back-room door?

A. Yes, sir.

Q. You say that they had been taken up when you went back?

A. Yes, sir; on Friday.

Q. And new ones put in?

A. Yes, sir.

Q. Tell us where the shots were.

A. Two shots in the front door.

Q. Go ahead.

A. Went in the post, outside of the post; and one shot had glanced the post next to the outside and went on the same side, and one shot had glanced the middle door, has went through the wall in the room; and one shot had went through nearer to the window, right straight through.

82 Q. In the back room?

A. Yes, sir.

Q. One shot had struck the middle door, and had passed out of the wall of the back room on the left-hand side as you go in?

Q. Yes, sir.

Q. Two balls had gone through the door?

A. Yes, sir.

Q. Which way did they go—in or out?

A. They went out from the inside.

Q. One had struck the post, you say, of these balls; or was it another ball that struck the post?

A. I could not say.

Q. One had struck the post on the outside; which post was it that was struck?

A. The middle post, next to the outside post.

Q. You say one went through the corner post and struck into the wall from the door about a foot and a half.

A. Yes, sir.

Q. You saw them on Thursday morning when you were there?

A. Yes, sir.

Q. Was the other man that lived with Big Aleck there—Jim Squirrel?

A. Yes, sir.

Q. You had been there the night before?

A. Yes, sir.

83 Q. That is the night that Big Aleck told you nothing of the kind had happened on his place?

A. Yes, sir; that was Wednesday night when he said that.

Q. What time Thursday morning did you get there?

A. I guess it was about ten o'clock, maybe nine, something like that.

Q. After you discovered these things, could you learn anything about where Wilson was?

A. No, sir.

Q. Could you find out where Hickory was?

A. No, sir; we didn't find out nothing; he said he didn't know where they was. He said Hickory had told him——

Q. Never mind that. Did you find anything about where Wilson, the marshal, was that day?

A. No, sir; I didn't.

Q. You could not find out?

A. No, sir; they said they didn't know anything about him.

A. Did they both tell you they didn't know about him—Aleck and Squirrel, both?

Mr. BARNES (of counsel for defendants). How many names has that man Squirrel got?

A. His name is Skalol, and they call him Squirrel.

The DISTRICT ATTORNEY. It is the big fellow that stays with Aleck, the long-haired fellow?

A. Yes, sir.

Q. Did both of them tell you they didn't know where Wilson was, or did you inquire of both of them?

A. Yes, sir; they both of them told us that.

Q. What did you do next, after you went there and made those observations?

A. We said we would go and let an officer know something about
84 it; I thought it would be the best, and we went on back close to the mill, and me and Jim Anderson went on to Tahlequah that evening.

Q. Who did you tell about it?

A. I told Paschal.

Q. That is this gentleman sitting here?
A. Yes, sir.
Q. He is a United States commissioner there?
A. Yes, sir.
Q. What time was that on Thursday evening?
A. It was pretty late; I could not say exactly what time it was.
Q. Then what did you do after that? State if you went back to the place any more after that evening.
A. We said we would meet at Luckey's mill next morning by eight o'clock, and we would all go up there together.
Q. Did you meet there next morning at Luckey's mill?
A. Yes, sir.
Q. Friday, that would be?
A. Yes, sir; on Friday.
Q. Then what did you do?
A. Went on up to Aleck's.
Q. How many of you?
A. I could not say how many went; there was about twenty I reckon; there was pretty near twenty, if there wasn't twenty.
Q. Were they all Cherokees?
A. No, sir; Cherokees and white folks mixed.
Q. When you went up there Friday, what did you find?
A. We found Aleck Stock and Jim Skolal there.
Q. I suppose you examined around the premises—those who hadn't been there?
A. Yes, sir.
Q. Did you see anything of the wagon any time when you were there?
A. No, sir; I never noticed at all about the wagon.
85 Q. The time you were there on Friday, did you see it?
A. Yes, sir; the wagon was there.
Q. Did you notice whether it had any blood on it or not?
A. I never noticed until some of them told me it was bloody.
A. Q. Did you look and see then?
A. Yes, sir.
Q. Where did you find the blood?
A. On the brakes and on the spokes and on the floor in the bed there was blood.
Q. Was the bed on the wagon?
A. No, sir; it was off.
Q. But it had blood in it?
A. Yes, sir.
Q. Did you see anything of an ax?
A. No, sir; I didn't see no ax at all.
Q. You went out to hunt for the man, did you?
A. Yes, sir.
Q. Did you find him?
A. Yes, sir; we found him late that evening.
Q. Please state if you saw anything of a horse.
A. Yes, sir; we found a horse first; some of the boys found him.
Q. Did you see the horse?
A. Yes, sir; after they found him; we came up and saw the horse.

Q. Did you know it?

A. It was the horse that Joe Wilson rode.

Q. That is the same horse he was on this Tuesday you heard this shooting up there?

A. Yes, sir; the same horse was laying there dead.

Q. Were there any wounds on the horse?

A. I noticed that he had been shot right in the knee.

Q. In the fore knee?

A. Yes, sir; on the right leg.

86 Q. Did you notice whether he had his throat cut or not, or did you observe that?

A. I don't know. The dogs had been eating his throat a good deal about that place around there, or something or another.

Q. That was the same horse that Joe rode?

A. Yes, sir.

Q. How far from the house was it that you found the dead man?

A. I guess it was mighty near a quarter from the house, off in a hollow.

Q. Wasn't it any further than a quarter? I am not speaking about the horse; I am speaking about the dead man.

A. The man was about a mile and a half, I suppose; I thought you was speaking about the horse.

Q. You found the horse about a quarter from the house?

A. Yes, sir.

Q. Did you find the man in the same direction you found the horse?

A. No, sir; nearly in opposite directions. The horse was laying here, and the man was laying up this way about a mile and a half.

Q. Did you notice the wagon track that went up there?

A. Yes, sir. We struck the wagon track, me and Jeke Parrism, off from the house about a quarter, I guess, and we went on the wagon sign. And we got out on the prairie, and we looked off and saw the other men coming that were hunting for him, and before we met them the other ones came near and motioned for us to come down, and we went on down; and they said they had found him, and that he had been taken out

87 there in a wagon. We just went on over there where he was.

Q. Did you say the wagon track went up there?

A. Yes, sir.

Q. How was that? Describe how close to the body the wagon track went.

A. The wagon had stopped right on top of a steep part of the hill; had stopped there, and it looked like he might have been thrown out; taken out of the wagon and dragged a little piece.

Q. And then rolled down the hill?

A. They must have rolled him down; it was kind of steep.

Q. How far down the hill did they get him?

A. A laying down about near to the foot of it; not quite to the foot of the hill.

Q. Didn't go all the way down?

A. No, sir; he was lodged up against a little bush, about that big [indicating about two inches].

Q. What was it; blackjack, or what?

A. I could not tell you what kind of brush it was.

Q. It was lodged against the brush?
A. Yes, sir.
Q. Could you tell by looking at him who it was?
A. No, sir; you could not know him.
Q. Did he have a coat on?
A. No, sir; he never had no coat on.
Q. Did you find any saddle or bridle about the horse?
A. No, sir.
Q. You stated on the day that he was shot that he had his coat.
A. Yes, sir; he had his coat tied up on the saddle.
Q. Did you find that coat when you found the body?
A. No, sir.
Q. Did you find it about the horse?
A. No, sir; and he had a slicker behind.
88 Q. Did you find the slicker?
A. No, sir; we never found it.
Q. What kind of a coat was it that he had on the saddle, if you can remember?
A. It was a kind of a coat with little checks on it; small checks; some few red threads running along on the checks.
Q. You didn't find the coat at all, but found the body in his shirt sleeves?
A. He had his vest on, and in his shirt sleeves.
Q. That is just the way he was when you left him?
A. Yes, sir.
Q. Could you tell who it was when you found him by looking at his face?
A. I could not tell his face. I knew his clothes—his shirt.
Q. Why couldn't you tell his face?
A. It was in bad condition.
Q. Corrupted?
A. Yes, sir.
Q. You knew the horse, did you?
A. Yes, sir.
Q. You stated about where the wagon stopped up on top of the hill; did you help get these things off of his body?
A. No, sir; I sat up on the side of the hill, and Charlie Snell and Jim Anderson, they went down; four of them, I don't remember who all, took those things out of his pocket.
Q. They are the ones who took the papers out of his pockets?
A. Yes, sir.
Q. Did you trail that wagon back to the house?
A. Paschal told me to trail the wagon back to where it came from, and me and Zeke Paris took the tracks right back the way it had come there.
Q. Where did you track it to?
A. Tracked it to the house of Big Aleck.
Q. You tracked it back, and it led to Big Aleck's house?
A. Yes, sir.
89 Q. Did you see the wagon when you came back?
A. Yes, sir; we tracked it back the way it went.

Q. In tracking the wagon back could you tell anything abou where the body was put on it, by tracking it to the place, or could you state?

A. No, sir; we could not.

Q. You tracked it back to Aleck's house, a mile and a half from where it started from?

A. Yes, sir; right under a tree.

Q. That is where the wagon was standing, under a tree?

A. Yes, sir; it was standing right in the same place, I reckon.

Q. How far was that tree and wagon from where you found the spot of blood outside by the smokehouse?

A. I guess it was about five steps from where the blood was, maybe further.

Q. You and Zeke Paris traced the wagon back?

A. Yes, sir.

Q. That is, you took the back track?

A. Yes, sir.

Q. You tracked it back to that tree?

A. Yes, sir.

Q. You found the wagon standing under that tree when you went there?

A. Yes, sir; I looked at the wagon and then found that blood on it.

Q. When you went back who did you leave with the body, when you came back after the wagon?

A. I think Charlie Snell was one.

Q. He is a white man. Did you get the wagon and go after the body?

A. Yes, sir; Paschal asked Aleck for the wagon, and he loaned the wagon to haul the body over to the mill. We told Aleck he would send his wagon back, and Aleck said all right, to take the wagon along.

90 Q. Did you see a wagon cover or wagon sheet there?

A. Paschal asked him for a sheet to wrap up this body in, and he went around the corner, and pulled out that wagon sheet, and when he handed it out it was bloody.

Q. Was there any blood on it?

A. There was some spots of blood.

Q. About how much, how big?

A. About that big (indicating about two inches in diameter). Paschal asked him what was that blood on there for, and he said he didn't know; he said if he had known it was bloody, he wouldn't have given it to us.

Q. That is what Big Aleck said?

A. Yes, sir.

Mr. BARNES (of counse' for defendants). I do not know that that hurts, but still we think it is not competent.

The DISTRICT ATTORNEY. After you got that, I suppose you went back and got the body. Did you go back with them to get the body?

A. Yes, sir; I helped to put him in the wagon.

Q. You came down to the mill?

A. Yes, sir.

Q. Do you know these defendants pretty well?

A. Yes, sir; I know them.

Q. Where did Sam Downing live, the one you call Hickory?

A. At Big Aleck's; he was raised there I think, mostly.

Q. Where did Shade live?

A. Shade stayed with his daddy from the time he was a boy up until he got grown, and then he was out at work at one place and then another.

Q. Do you know at the time the killing occurred, whether Shade was on the scout or not, or was he living with his father?

A. I don't know.

91 Q. Did you see either one of them shortly after this killing?

A. No I didn't.

Q. How long after this killing was it that you saw Hickory?

A. I never saw him after.

Q. What became of his wife?

A. I don't know what became of her; she went off somewhere; went to Springfield, so I heard.

Q. Where were you Friday night?

A. I staid all night above my place. After we brought Wilson's body down to the mill it was late, and I rode all day, and I just stopped there.

Q. You didn't stay at home?

A. No, sir.

Q. Where was your wife?

A. She was at home.

Q. You didn't see Shade on Friday night?

A. No, sir; I saw him Friday morning.

Q. Where did you see him on Friday morning?

A. Right close to Harlow's, on 14-mile creek. We were going toward the mill to meet Paschal, and all of them, and we met Tom Shade with a gun in his hand. He spoke to Carey, and told him hallo, and just loped on.

Q. Did you say that he had a gun?

A. Yes, sir; a Winchester in his hand.

Q. Which way was he going?

A. Going down close to Bald Mountain.

Q. What direction did Big Aleck live from you?

A. Right in this direction, and Shade was going this way.

Q. Going north?

A. Going right west.

92 Q. You never saw Hickory any more?

A. No, sir; I never saw him.

Q. Did you see the marshals up there in the country looking for him?

A. Yes, sir; they were all the time up in there.

Q. He was on the scout?

A. I expect he was. We could hear of him every once in a while around there.

Q. When Wilson was with you on Tuesday, did he have any arms?

A. Yes, sir.

Q. What did he have?

A. He had a pistol.

Q. When you found his body, did he have any pistol?

A. No, sir; he never had any belt on nor never had any pistol when we found him.

Q. When you found the horse, did you find the bridle and saddle?

A. No, sir; he never had no bridle or saddle on.

Q. But it had when it was at your house on Tuesday?

A. Yes, sir.

Q. Then the bridle and saddle was gone, and the coat and slicker, and the pistol and belt were gone?

A. Yes, sir; that is right; me and Zeke Parris found a pair of bridle head-stalls, but it wasn't Wilson's, though.

Cross-examination by Mr. THOMAS H. BARNES (of counsel for defendants):

About what time of day was it you heard these shots?

A. I could not say what time it was.

Q. Was it about five o'clock in evening?

A. Four or five; it could not have been five o'clock. It wasn't so miserably late.

Q. Was it between four and five?

A. I expect it was about that; I could not say exactly right what time it was.

93 Q. Give your judgment.

A. It wasn't more than four o'clock, I guess.

Q. You speak of hearing one shot, and then there was an interval, and you could have gone two steps, and then you heard the other near together, that is nearer than the first one, and these two you speak of. You speak of the last shot being keen shot, as though it was from a rifle?

A. Yes, sir; that is about the way it sounded.

Q. Did I understand you to say that you didn't know whether that shot was in the same direction as the other shots or not?

A. Yes, sir; I don't know which way that shot was; I don't know the direction.

Q. You had gone a little piece, twenty steps or so, at the time you heard this shot a little piece?

A. Yes, sir.

Q. The other shots sounded about alike, as far as the noise was concerned?

A. Yes, sir.

Q. How many shots, or, in other words, how many sounds of shots did you hear about that house; you saw the sign of where one had struck the house outside, at the southeast corner post?

A. Yes, sir.

Q. You don't know whether that house set exactly with the points of the compass or not; it didn't set exactly north and south, did it?

A. No, sir.

Q. That struck the outside of the post; did it strike the edge of the post?

A. Yes, sir; right on the sharp part of the post.

Q. Did you ever see any sign where the ball had struck the

94 wall near the door?

A. We expected it was the same shot came from the post that struck the wall of the house about a foot and a half from the door.

Q. That is the way you inferred it was by looking at it?

A. Yes, sir; we looked at it to be that way.

Q. Then you saw the sign of the shot, or two shots going through the door from the inside, didn't you; one a little lower down than the other?

A. Yes, sir.

Q. Then you saw a sign of a shot from the post, coming from the same direction, as though it had—one of the shots had come through the door; that is, you saw two posts that had been struck?

A. Yes, sir; I could not say if that was the same one that came through the door or not; the middle post was glanced; I could not say whether it come in or come out.

Q. Didn't it appear to you to be going out; didn't the one that struck this appear to go in and the other to go out?

A. I could not say.

Q. Think about that; isn't that the way you stated it before; didn't it appear to you that one shot had gone in and another one had gone out from the appearance of the post there?

A. The way it appeared to me like was like the shot in the middle post was glanced on the floor; that it was the same shot that came through the door, and glanced on the floor of the porch.

Q. You speak of a shot striking the floor of the porch?

A. Yes, sir; right at the end of the porch; there was a shot had grained a little and glanced, and we expected that was the same shot that came through the door.

95 Q. There was signs on two posts; two holes through the door, a sign on the floor of the porch, and then there was a sign of a shot having struck the side of the hall door, or door facing; which was it?

A. Of the door shutter; that had glanced and struck on the left-hand side of the room, and went through the wall.

Q. And then there was a sign of one which had gone from the back room in there. Now, was there a sign of any other shot that had gone through the door and struck the wall of the room, besides the ones you are telling about?

A. Yes, sir; right by the side of the window.

Q. As if it had gone through the open middle door and struck near the window. There was a sign near the window. You took it that that had been fired from the back room through the middle door and had struck there?

A. Yes, sir.

Q. Was therd any other signs of shots there?

A. No, sir; not that I know of.

Q. Do you know where a treex stood out from the east post or corner of the house?

A. Yes, sir.

Q. One where the wagon was said to have been?

A. Yes, sir; there was a tree there about this size [indicating about 18 inches through]. Maybe it was smaller; it wasn't such a large tree, though.

Q. What course did that tree stand from the corner of the house?

A. At that place it was right southeast.

Q. You say you went up there that night.

A. Yes, sir; there was four of us.

Q. You rode up there and went around to both houses?

96 A. Yes, sir; we rode from the way we had come, and come right up to the new house first.

(Witness is shown diagram.)

Q. Then you went around to this house?

A. Yes, sir.

Q. Do you know how much further that spot of blood is from the house than this tree?

A. I could not say; about four steps, maybe a little more from the tree.

Q. Was it dark when you went there?

A. Yes, sir.

Q. Could you have seen a man if he had been laying around there unless you had ridden close to him?

A. No, sir.

Q. There might have been a body out there and you not seen it?

A. Yes, sir; there might have been.

Q. If there had been anybody there alive, able to speak to amount to anything, of course you could have heard it, or at least they could have heard you. You went all around there?

A. Yes, sir.

The DISTRICT ATTORNEY. You spoke in Cherokee?

A. Yes, sir.

Mr. BARNES. Are you certain you spoke in Cherokee altogether?

A. Yes, sir.

Q. You rode around there, and you saw a fire through the cra'ks of this house?

A. Yes, sir; there is no chinking in the old house, and the door facing fell off, and the logs kind of fell down, leaving wide cracks.

The DISTRICT ATTORNEY. An old log house?

A. Yes, sir.

Mr. BARNES. You saw blood on the outside of the door, I believe you stated?

A. Yes, sir; on the outside of the front door?

97 Q. Could you say whether the blood had been made by somebody's hand that had been handling the body or something of that sort—I mean some one put their hands against it. Was it bloody, as though the hands had touched it, or could you tell anything about it?

A. We could not tell anything about it; there was just a spot about that big [indicating about as big as a silver dollar].

Q. How that come to be made, or was made, you could not tell?

A. No, sir.

Q. You say there was some specks of blood in the room and you have told about blood on the floor. It appeared to you, didn't it, from the sign, that whoever put that blood there, that they had gone at the side door—that is from the amount of blood you saw—that they had gone from about the middle door, out of the side door, and from that side door, around to where they claim this blood was found there. There was blood scattered along on chips all along there?

A. Yes, sir.

Q. About this horse; you tell something about talking to one of them about it?

A. Yes, sir; old man Skalol.

Q. Did he tell you when he saw the horse walking around there?

A. He said that he hadn't seen the horse at all when Paschal asked him about the horse; he said he hadn't seen the horse and didn't know nothing, and when we found the horse he come up and we asked him if he knew where this horse was, and he said no, he didn't. He said that he saw the horse Wednesday right out here.

Q. That is what I want to get at. He did claim finally to have seen the horse Wednesday out near where the horse was found?

A. Yes, sir.

98 Q. Walking around alive?

A. Yes, sir.

Q. What time of the day Wednesday did he say that was?

A. He never said. He said the horse was pretty near dead at that time Paschal told him then, "You never told me anything about it when I was asking about the horse at the house; why didn't you tell me you had seen the horse?" and he said he just thought it was somebody's horse loose around there.

Q. But still when he said he did see him walking around there he was pretty near dead?

A. Yes, sir.

Q. And that was Wednesday?

A. Yes, sir.

Q. Did either of these men claim to you to have seen any boys there before you came there? The old man, Aleck, and Jim both told you they hadn't seen any of the boys there.

The DISTRICT ATTORNEY. They said that they themselves were away from home.

The WITNESS. They said there hadn't been anybody there; that was Wednesday night.

Mr. BARNES. There was more fire Wednesday night up in that little cabin, or old house as you call it, than there was Tuesday night—Tuesday night just after dark?

A. Yes, sir; there was just a fire of coals in the' Tuesday night, and Wednesday night there was a good light in there, and both the old men was in there, and they came out.

Q. Both came out Wednesday night?

A. Yes, sir.

Q. Do you know whether this old man, Jim, usually stayed in that old house?

A. No, I don't know, but he said he stayed in there; that there was where he lived.

99 Q. You don't know that old Jim usually stayed up there in that old house, and that Aleck usually stayed down there with Sam and his woman?

A. No, sir.

Q. Aleck Stock is the man that owned the place?

A. Yes, sir; I think so.

Q. He is the man that built the big house there?

A. Yes, sir; anyhow, Jim said Thursday when I went down there that he lived at the old house.

Q. Jim claimed to live at the old house?

A. Yes, sir.

Q. Wednesday night, when you went there, they both came out of the old house?

A. Yes, sir.

Q. That is, both of the old men?

A. Yes, sir.

Q. It wasn't until finally you went there in the day time with a crowd that old man Aleck appeared to know anything, and then said he supposed you came to see the shots in the house—to examine the house, I believe you said awhile ago?

A. Yes, sir.

Q. Was the body of that dead man stripped or the clothing taken off, as far as you know?

A. No, sir; he had his pants on and shirt.

Q. Did he have a vest on?

A. Yes, sir.

Q. I mean after that body was found, was the body ever stripped?

A. No, sir; it was just the same, but the shirt had been drawed up a little.

Q. What I want to know is, if afterwards the clothing was taken off of the man's body for the purpose of examining him to see if there was any wounds on him?

A. No, sir; not right there; there was nobody examined the body at all; we just took some papers off of him.

Q. Do you know where that ball went into his body?

A. I seen his bosom here open, and I saw a blue spot run out that way.

Q. Did you see where it came out on the other side?

A. No, sir.

Q. Do you know how near the backbone it came out?

A. No, sir; I never examined it at all.

Q. Which way was Tom Shade going when you saw him Friday?

A. When I saw him Friday morning he was going west?

Q. You don't know whether he had been over to Johnson's or not?

A. No, sir; I don't know where he had been.

Q. I believe you say it was on 14-mile creek you saw him?

A. Yes, sir.

Q. Four or five miles, I believe you say, from where Big Aleck lived?

A. Yes, sir.

Q. Which way was he going?

A. Going right down west.

Q. And he spoke to one man that was with you—spoke to Squirrel—and rode on?

A. Yes, sir; came in sight in lope and passed along in a lope.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say that Skolal or Squirrel told you at first that he hadn't seen the horse around there?

A. Yes, sir.

Q. But after you found the body he said he had seen him on Wednesday?

A. Yes, sir.

101 Q. That is the day after the killing on Tuesday evening?

A. Yes, sir.

Q. These men claimed to be away from there, didn't they?

A. Yes, sir.

Q. Where did he say they had been?

A. He said he was off to a fish killing, Jim did, and never got back until 'way in the night on Tuesday.

Q. Where did the other old man say he was?

A. He said he was down to George Scooger's, at Mrs. Brown's, they call it, doctoring Mrs. Brown, I think he said.

Q. When did he get back?

A. He said he got back Wednesday evening.

Q. That is the evening you were there and found them there?

A. Yes, sir; on Wednesday evening.

Q. What time on Tuesday night were you there?

A. Just a little after dark. It was after sundown when we started up there, and it took us until after dark to get to the place.

Recross-examination by Mr. THOMAS H. BARNES:

You say that the old man, Aleck, claimed it was Wednesday night he got back, and old man Jim said it was late Tuesday night when he got back?

A. Yes, sir.

Q. Are you sure the other man didn't say Wednesday morning instead of Wednesday night?

A. No, sir; he said Wednesday evening.

Q. Did he say about what time?

A. He said the sun was about there [indicating].

Q. That would make it about four o'clock?

A. Yes, sir.

102 EZEKIAL P. PARIS, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. State your name, please.

A. Ezekial P. Paris.

Q. Where do you live?

A. Tahlequah.

Q. I believe you are the newly elected sheriff?

A. Yes, sir.

Q. Do you know these defendants here, Thomas Shade and Sam Downing?

A. Yes, sir.

Q. What is Downing's name, Hickory or Downing? What did he go by up there in your country?

A. He goes by the name of Sam Hickory up our way.

Q. Do you know what his real name is, whether it is Sam Hickory or Downing?

A. No, sir.

Q. Point out which one is Hickory, and which one Shade.

A. The one on the right from me is Hickory, and the one on the left is Tom Shade.

Q. The one next to the lawyers?

A. Yes, sir.

Q. Did you know Joseph Wilson, the deputy marshal that was killed there?

A. Yes, sir.

Q. You knew him to be a deputy marshal, did you not?

A. Yes, sir; he was a Muscogee deputy.

Q. How long had you known him?

A. I don't know how long; it had been some time.

Q. How long had he been riding, do you know?

A. No, sir; I do not; I understood he was riding before he came to Tahlequah.

Q. How long was he at Tahlequah?

A. I don't know just how long.

103 Q. What aged man was Joseph Wilson?

A. I should judge him to be about 25; I don't know exactly.

Q. Do you know whether he was a married man or unmarried man?

A. I think he was a single man; he told me he was.

Q. What sized man was he?

A. He was a kind of a heavy, chunky man; not real chunky, either.

Q. Was he short or tall?

A. He was short, not overly heavy.

Q. When did you first learn that he had been killed or that it was probable that he had been shot?

A. It was on Thursday; John Carey came and told me.

Q. John Carey is the witness who has just gone from the stand?

A. Yes, sir.

Q. When was that?

A. That was in September, about the 24th.

Q. Did you go over there with the others?

A. Yes, sir; myself and Judge Paschal got into a buggy.

Q. You were not the sheriff at that time?

A. No, sir.

Q. Who was the sheriff, then?

A. Mr. Clarke, the gentleman sitting there by your left.

Q. You are the sheriff now?

A. Yes, sir.

Q. You had been elected at that time?

A. Yes, sir; I had been elected in August, and this was in September.

Q. You had not been inducted into office?

A. No, sir.

Q. You say Mr. Clarke went over there?

A. Yes, sir.

Q. So you also had a sheriff-elect and a sheriff and United States commissioner?

A. And a deputy marshal with us; yes, sir.

104 Q. It is rather a repetition, but I will get you to state what you found there.

A. We went to a little mill that was near by the place, three or four or five miles, I don't know which, myself and Judge Paschal in a buggy. We got onto horses after we got there and rode horseback.

Q. Who did you find at the house?

A. No one there but the old man and Big Aleck, as we called him.

Q. Where was Jim?

A. He was down at the other house.

Q. What did you find?

A. We found the condition the house was in, and we asked him what had happened there and he didn't know anything about it or wouldn't tell us anything, and we just looked around, and Judge Paschal wanted an interpreter, and he took John Carey and he denied knowing anything about it or the affair, and we just went and looked around.

Q. Which way does the house front?

A. I believe it faces east or a little southeast, if I am not mistaken; it might be due south; I don't know.

Q. If you call it facing south we will get all our directions alike. Go on and state what you saw.

A. We went out east of the house looking around, and we came across a dead horse a little bit southeast of the house.

Q. Southeast?

A. No; it was nearly due south of the house.

Q. If the house was facing east, it is nearly south, and if the house was facing south, it would be a little southwest, wouldn't it?

A. The horse was south of the house the way I looked at it.

(Witness is shown diagram and locates horse.)

105 Q. Then it would be southwest then if this is east, and the horse would be south?

A. Yes, sir.

Q. You found the horse?

A. Yes, sir; we looked all around these woods all over that country there.

Q. When you found the horse, you found it with neither saddle or bridle?

A. Yes, sir.

Q. Did you observe whether its throat was cut?

A. There was a cut there; it looked like the hogs, or varmints, or something, had been eating on it; looked like it had been cut, though.

Q. Did you see any blood there?

A. Yes, sir.

Q. How much?

A. There was some blood; not a great deal.

Q. You went in what direction after that?

A. We went in another direction, until we happened on the body.

Q. How far from the house was the body?

A. About a mile and a half I would judge it.

Q. Did you see any wagon track?

A. Yes, sir.

Q. Where was the wagon track?

A. The wagon track led back to the house.

Q. Led from the house to the body?

A. Yes, sir.

Q. How close to the body?

A. About 25 or 30 feet from the body.

Q. Could you tell how the body had been taken from the wagon?

A. No, sir; the body had been taken over the fore wheels. There was a deep hole there, hollow, and the wagon run right along on the side of the hill, on the brow of the hill, and this body was thrown out
106 right on the edge there, and it looked like it was dragged down there, and it was partly dragged, anyway.

Q. How do you know it was partly dragged?

A. You could see where it was dragged along.

Q. You saw the trail where it had been dragged along?

A. Yes, sir; you could see where it had been partly packed and partly dragged. Mr. Bill Harnage picked up a lead pencil where the body came down the hill.

Q. Between where the body lay and the top of the hill?

A. Yes, sir; about halfway, or nearly halfway between.

Q. Did he have any coat on?

A. No, sir.

Q. Any hat?

A. No, sir.

Q. Any pistol?

A. No, sir.

Q. Were you there when his pockets were examined to see if he had any money?

A. No, sir; we didn't make much of an examination. Myself and Judge Paschal went back to Tahlequah to dig a grave, and we left a man in charge to bring on the body.

Q. Did you see any bullet holes about the house?

A. Yes, sir.

Q. Where?

A. There was a bullet hole in the front post up in the little porch in front; there was a bullet hole in the first post; it didn't go through the center, but went through the edge, and hit the house, a log house, and then I found two holes in the front door.

Q. Which way did they go, in or out?

A. They came out from the house.

107 Q. Go ahead?

A. On the inside, at the back door, or middle door rather; the door that opened back that way; one ball grazed the door.

Q. That would be on the side of the door towards the kitchen when the door was shot?

A. Yes, sir; if the door was open.

Q. Then it would be the side that would be in the back room?

A. The door opened in the back room. It was just about half open that way.

Q. Of course you don't know how the door was when the shot was fired?

Mr. BARNES. It had to be open or it would not be grazed.

The DISTRICT ATTORNEY. That struck on the inside of the little room?

A. Yes, sir; that glanced and hit a corner of the little room.
Q. Was there any other marks?
A. One ball went straight through the door there by the little window.
Q. You don't mean by that it went through?
A. It came from the house out.
Q. You found a shot near the window, in other words?
A. Yes, sir; and the shot came in the main building.
Q. You can't tell whether it did or not; you supposed so?
A. It looked like it went that way; and I testify it did.
Q. Did you find any other shots?
A. No, sir; I believe *nt* not. I believe five shots is all I saw.
Q. Did you see any blood?
A. Yes, sir.
108 Q. Describe that.
A. There was blood in the side room, there on the floor.
Q. How much was there of it?
A. It was pretty dim; looked like the plank had been turned over?
Q. Were you there when the planks were turned back again?
A. I went there and Judge Pascbal and Harnage lifted it up and saw the blood underneath.
Q. Did you see any blood on the outside of the house?
A. Yes, sir.
Q. Where was that?
A. That was out near the little smokehouse.
Q. Did you examine the wagons?
A. Yes, sir.
Q. Was there any blood on that?
A. There was blood in the wagon and on the brake, and on the wheel.
Q. You didn't see the ax?
A. No, sir.
Q. The ax was not found by your party?
A. No, sir.
Q. Were you present when this diagram was made?
A. Yes, sir.
Q. Are these windows and doors located about right?
A. Yes, sir.
Q. I believe you assisted in making it?
A. Yes, sir.
(Cross-examination waived.)
Here court adjourned until Saturday morning, August 20, 1892.

109 SATURDAY MORNING, *August 20th*, 1892, 9:00 o'clock.
JAMES ANDERSON, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. Is your name James Anderson?
Answer. Yes, sir.
Q. Where do you live?
A. I live 12 miles northwest of Tahlequah?
Q. How far do you live from where Big Aleck lives?
A. Two miles and a half, I guess.

Q. Please state if you know these defendants, Shade and Hickory.
A. I had seen them a few times before.
Q. Do you know where Hickory lived?
A. Yes, sir.
Q. Where did he live?
A. He lived about 2 miles and a half northwest of where I lived.
Q. Did he live with Big Aleck?
A. Yes, sir.
Q. Where did Shade live?
A. I don't know just where he did live.
Q. Were you over at Big Aleck's house after the killing of Wilson?
A. Yes, sir.
Q. Who did you go with?
A. There was several of us went; John Carey and—
Q. When did you first go?
A. I went on Thurday, first.
Q. You went over there on Thursday with the other parties?
A. Yes, sir.
110 Q. Were you there any more after that?
A. Yes, sir; I was on Friday, the next day.
Q. Who were you with on Friday?
A. I could not just tell who all.
Q. You were with the crowd on Friday?
A. Yes, sir.
Q. Did you see the woman there that Hickory was living with?
A. Yes, sir; she was there on Thursday.
Q. Where did you see her?
A. She was at the little house right below; it must have been 150 yards from where the killing was done, I suppose.
Q. The little house north of the killing?
A. Yes, sir; I think it was north.
Q. Go on and state how you came to see her.
A. We went there on Thursday, and we looked around there, around the house, and we seen the shots in the house, how the house had been shot up. We seen blood in the yard and we seen blood in the house—and I asked John Carey to ask Big Aleck where this man was, where Hickory was, and he said "he didn't know." I told him to ask him then, where Hickory's wife was, and he pointed out southeast from there, and said she went over that way this morning, and he said he reckoned she went to her mother's. That is all John told me; he was the interpreter. We looked around there and seen what we could see about the house, and I told the boys for some of them to stay there and some of them to go down to the other house and see if we could see anything there. We went down there and when we stepped to the door and looked in the house, she was sitting just to the left of the door.
Q. Setting in the old house?
111 A. Yes, sir; she was by herself, I suppose; didn't see anybody else.
Q. He said he didn't know where Hickory was?
A. No, sir; they said they didn't.
Q. She was by herself?

A. Yes, sir; I suppose so; I didn't see anybody else in there.
Q. You were not along when the axe was found, were you?
A. No, sir; I didn't see the axe.
Q. You saw the bullet holes in the house and the blood you speak of in the house and outside; did you observe a wagon, whether the wagon was bloody or not?
A. Yes, sir; I seen the blood on the wagon?
Q. You were there when the body was found?
A. Yes, sir.
Q. Did you see the horse?
A. Yes, sir; I seen the horse.
Q. Did you notice whether there was a hat—where the deceased's hat was?
A. No, sir; I never seen the hat at all.
Q. The hat was not at the body?
A. No, sir; I didn't see any.

Cross-examination by Mr. THOS. H. BARNES:

I believe you say it was Thursday you were there?
A. Yes, sir; I was there on Thursday.
Q. That is the first time you were there, and then you were there on Friday, were you?
A. Yes, sir.
Q. What time of day Thursday were you there?
A. It must have been about 9:00 o'clock, somewhere about that time.
Q. Was John Carey there with you at that time?
A. Yes, sir.
Q. And several others, I suppose?
A. Yes, sir; there was several of us; I think there was 8 or 9 of us went there at that time.

112 DAVE RUSK, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. State your name.
Answer. David Rusk.
Q. I believe you are a deputy marshal, are you not?
A. Yes, sir.
Q. Where do you live?
A. I live at Sloan Springs.
Q. Do you know these defendants?
A. Yes, sir.
Q. How long have you known them?
A. I have known them since in September, I believe, I got Shade, and in March I got Hickory and brought him here.
Q. You arrested them?
A. Yes, sir.
Q. Do you know where Big Aleck lives?
A. Yes, sir.
Q. That place where Joseph Wilson, the deputy marshal, is said to have been killed?
A. Yes, sir.

Q. Were you up there shortly after the killing?

A. Yes, sir; I think it was about a week afterwards that I was there.

Q. You may state all you observed there.

A. I seen there was some shooting had been done in the house, and I seen blood there.

Q. How do you know there had been shooting done?

A. There was bullet holes; I suppose there was shooting.

Q. You saw bullet holes in the house?

A. Yes, sir.

Q. How many did you observe, do you remember?

A. There was two came out at the front door; there was one in
113 the post on the porch—what I would call the porch, the post that set up. There was another one in the middle door that led into the side room; there is a side room to the house. It looked like it glanced and went into the wall of the side room, and there was another one at the door at the end of the side room.

Q. Was it there or at the window?

A. It was at the door.

Q. Which side of the door?

A. On the right-hand side as you went in.

Q. The door opened that way, did it not?

A. Yes, sir.

Q. How far from the door?

A. I think it must have been about a foot or 18 inches, as well as I remember, that is.

Q. Did you see one at the right of the window?

A. Yes, sir.

Q. There was one there, too?

A. Yes, sir.

Q. One to the right of the little door as you go in; one at the right of the window; one glanced the door, went into the left wall; two through the door, and one in the post?

A. Yes, sir.

Q. Did you observe any blood?

A. Yes, sir; blood in the side room.

Q. Which post was it that you saw the bullet hole?

A. I think it was in the middle post, as well as I remember; although there was three posts on the porch. It stood to the right of the front door as you went in.

Q. Now, then, where was the blood?

A. The blood was in the side room.

Q. Whereabouts in the side room—what part of it?

A. There was a plank that was turned over that had blood on it after we turned that up. We learned that they had sawed the plank in two, and we turned the plank up again and looked at it and there was blood on the plank; it seemed they turned the plank down that had
114 *turned the plank down that had* the blood on it—turned the blood down so you could not see it, but we turned the plank over and found the blood.

Q. Did you see any blood on the outside?

A. I think there was a little splotch of blood or two on the porch, and one on the ground on the outside.

Q. Do you know where the smokehouse is?

A. I know where there is a little house standing out from the main house.

Q. Did you examine around there to see if there was any blood there?

A. There was blood near there on the ground; it looked like blood.

Q. Who went with you?

A. Milo Creekmore.

Q. Is he here?

A. Yes, sir.

Q. Who else?

A. John Yoes, and Sterling McDaniel, and one of the Still boys.

Q. Please state if you found an axe there.

A. Yes, sir; we found four axes. The boys went down to old man Jim's; they called him about 50 yards from the other house and found four axes down there.

Q. Please state if you found any of them with blood on it.

A. Yes, sir; we found one that we pronounced had blood on it.

Q. Where did it have that blood?

A. On the pole of the axe they would call it, back of the axe and on the handle right close to the back of the axe.

Q. Where did you find that axe?

A. We found that at Jim's; they call him Jim Stocks, I think; I believe they call him that. We arrested him there that morning.

Q. Where did he live?

115 A. He lived about 50 yards of Big Aleck's, where this killing is supposed to be done.

Q. In the old house north of Big Aleck's?

A. Yes, sir.

Q. A bloody axe you found down there?

A. Yes, sir. They denied having any axe, and I told the boys to go down there and make a search for it, and they went down there and found four axes, and brought them up.

Q. Who denied having any axe?

A. Jim, they called him; a long-haired fellow.

Q. Were all these things at the same place?

A. Yes, sir; all at the same place.

Q. Did you find any at Big Aleck's?

A. No, sir.

Cross-examination by Mr. Thos. H. Barnes:

Q. Were there three or four posts to that house?

A. I disremember; there might have been four, not over that, I don't think, and might have only been three.

Q. You speak of three, but you are not certain but what there is more?

A. No, sir; I would not be positive.

Q. You didn't observe the posts there, the corner posts?

A. I went there and looked there to see what had been *down*, and I saw there was a bullet hole in it.

Q. That is, you saw one post with a bullet hole in it?

A. Yes, sir.

Q. You think there was three posts and maybe more?
A. Yes, sir.
Q. How many axes did you find?
116 A. I found four; they brought four up there to Big Aleck's; I sent them down there to hunt axes.
Q. Was it three or four you found?
A. They brought up four.
Q. Are you sure of that?
A. Yes, sir. They said they got them under the floor at old Jim's house.
Q. Where old Jim staid?
A. Yes, sir.
Q. You are not positive there was blood on this axe, are you?
A. I would think I know blood; that was my judgment about it.
Q. Whereabouts was it; you say it was on the handle of the axe?
A. Yes, sir; a little splotch of blood right near the pole of the axe on the handle.
Q. Do you say positive' there was blood on the axe; are you certain; or was it only just a kind of opinion of yours?
A. To the best of my knowledge, there was blood.
Q. Have you not made a statement heretofore about this matter in which you said you could not say certain it was blood, but you thought that it was?
A. I don't think I made such a statement.
Q. Was there any dirt on it?
A. No, sir.
Q. What kind of axes were they?
A. Old axes like; only one that had been used, looked like, and that was the one that had the blood on it, and the others were rusty.

117 BRYANT HUGHES, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Bryant Hughes.
Q. Do you know this defendants, Hickory and Shade.
A. Yes, sir.
Q. What are you, a Cherokee or white man?
A. A Cherokee.
Q. Were you at the place where Wilson, the deputy marshal, is said to have been killed, after the killing?
A. Yes, sir; I went up there Friday after the killing.
Q. You saw the things around the house.
A. Yes, sir.
Q. Please state if you saw any axe with blood on it?
A. Yes, sir; I saw blood on the handle.
Mr. BARNES (of counsel for defense). That is a leading question. It would seem the better way would be to ask if he saw an axe, and if so, what was its condition.
The DISTRICT ATTORNEY. Where did you find the axe of which you speak?

A. There was three or four axes there.
Q. Where?
A. Over on the other side at the next house, in the old house.
Q. Did you help find them.
A. No, sir; I seen the axes laying there; I didn't help the other boys find them.
Q. There were four axes altogether?
A. Yes, sir; that is all I seen; four axes there.
Q. You speak about blood being on one?
A. Yes, sir; it looked like blood on the handle; I could not
118 make out it was blood or *or* not.
Q. On what part of the axe was it?
A. Just under the back of the axe.
Q. The pole of the axe, the back part of it?
A. Yes, sir.
Q. Where were you the next Sunday?
A. I was close on the creek, there.
Q. Was there anybody with you?
A. Yes, sir; Aaron Carey was along.
Q. Please state if you saw the defendant, Hickory, on that day.
A. Yes, sir.
Q. Where was it you saw him?
A. There close to his mother's.
Q. How far is that from Big Aleck's?
A. It is about four miles, I reckon.
Q. Was he in his mother's house, or where was he?
A. He was away of' from his mother's house, about half a mile.
Q. In the road, or woods, or where?
A. Out on a trail in the woods.
Q. How far did you say from his mother's house?
A. About a quarter, I reckon, from the house.
Q. Was he armed or unarmed?
A. He was armed.
Q. What with?
A. He had a Winchester.
Q. Was there anybody with him?
A. No, sir; by himself.
Q. You and Aaron Carey were together?
A. Yes, sir.
Q. If he made any statement to you about the killing, state what he said?

Mr. BARNES (of counsel for defense). That is, any statement in regard to his connection with it, but I do not think anything else is competent.

119 The DISTRICT ATTORNEY. If he made any statement to you about the killing, how it was done? State what he said.

A. He said he was the one that——

Mr. BARNES (of counsel for defense). I except to his making any statement about it, except what he did himself.

The COURT. I think the statement would be competent as affecting him, affecting his knowledge of the matter. Of course it could not affect the other defendant, a statement made after the killing, but it is competent because it affects him, shows he had knowledge of the matter, and may be a circumstance to show his connection with it.

The DISTRICT ATTORNEY. I want you to go ahead and tell all about it.

A. He said he shot the marshal, and he said Tom Shade knocked him in the head with the axe.

Q. He just told you and Aaron that together?

He told me Aaron was off apeice. He just heard what he said about Tom; he didn't hear it all, I guess. Aaron will give evidence what he knows.

Q. Aaron was off apeice?

A. Yes, sir.

Q. He told you that he shot the marshal and Tom knocked him in the head with the axe?

A. Yes, sir.

Q. Did he say how long after he shot him until Tom Shade hit him in the head with the axe?

A. No, sir; he didn't say what time it was.

Q. Did he tel' you anything else about it except that?

A. No, sir; he didn't say anything about it at all.

Q. That was on Sunday you had this talk with him?

A. Yes, sir.

Q. Did you see anyt'

120 Q. Did you see anything more of Hickory after that?

A. No, sir.

Q. Did he state he was going to leave the country?

A. He said he was going to leave the country; yes, sir.

Q. Did he say where he was going?

A. No, sir; didn't say where he was going.

Q. Did he talk to you in English or Cherokee?

A. He talked in Cherokee.

Q. When was it you were at the house first, did you say, when you saw the axe; what was the day?

A. It was the same day they were all there; I didn't say anything about it; I didn't tell anybody anything about it. I just seen the axe laying there.

Q. Was it the same day these men were there?

A. Yes, sir; it was the same day we were all up there.

Q. Who was with you?

A. That fellow, Mr. Paschal.

Q. Were you there with Creekmore?

A. No, sir; I wasn't along with him. I could not say it was blood at all; I could not tell; it looked like blood on the handle.

Q. You could not be certain about it being blood?

A. No, sir.

Q. And it was the next Sunday after that that he told you this?

A. Yes, sir.

Q. Which one of the defendants is Hickory?

A. That fellow setting there [pointing to defendant with black coat on].

Cross-examination by Mr. THOS. H. BARNES:

You saw four axes there, did you?

A. Yes, sir; the best axe looked like it had blood on it.

Q. One of them had something on the handle?

A. The best axe.

121 Q. That you thought was blood, but you wouldn't be certain about it?

A. Yes, sir; I would not be certain.

Q. You say Mr. Paschal was present at that time?

A. He was along hunting; didn't see the axe at all; he might have seen it afterwards.

Q. Who else saw the axe?

A. There was two of them saw the axe; of course they can tell what they saw.

Q. Are you an Indian?

A. Yes, sir.

Q. Where do you live up there?

A. I live up there in the Nation.

Q. How far from Hickory?

A. I used to live right close to him; I don't live there now.

Q. You met him in the woods on Sunday?

A. Yes, sir.

Q. Aaron Carey was with you?

A. Yes, sir.

Q. You and Aaron were travelling together?

A. Yes, sir.

Q. You met this man in the woods, and he had a gun?

A. Yes, sir.

Q. You didn't talk to him but a minute, did you?

A. We talked a little while.

Q. You and Aaron Carey were right close together, were you not?

A. Aaron Carey was off apeice.

Q. Wasn't you in three or four steps of each other?

A. About where that man is yonder [indicating about 30 feet], or may be a little closer.

Q. How far do you put yourself from Carey when this conversation was going on?

A. I will say about 10 steps.

Q. I will ask you if it wasn't about four or five.

A. No, sir; about 10; I didn't measure it, but I think about 10.

122 Q. You and Carey were travelling together?

A. Yes, sir; of course he stopped——

Q. He talked to him, too, did he not?

A. No, sir; he just listened.

Q. He listened?

A. Yes, sir.

Q. He didn't hear that part of it where he said that Tom Shade knocked him in the head?

A. He said he could not hear it good.

Q. That part of it?

A. Yes, sir.

Q. Didn't anybody hear that but you?
A. He heard Tom Shade's name.
Q. But he didn't hear that part of it?
A. No, sir; I reckon not; he said he didn't hear it all.
Q. Wasn't he in about 6 steps of you, near enough to hear all this conversation?
A. He said he couldn't hear that.
Q. He could hear all of it but that; nobody could hear that but you?
A. There was me standing there; I could hear all of it.
Q. He didn't say when he shot him or when the other man knocked him in the head; just said he did it?
A. It was on Tuesday.
Q. He was going to leave the country?
A. Yes, sir.
Q. You were walking along when you met the man?
A. Yes, sir.
Q. Whereabouts in the woods was it?
A. Right close to his mother's; about a quarter from his mother's.
Q. That might be north, south, east, or west.
A. About northeast.
Q. What were you doing in the woods there?
A. We were going over towards Fourteen Mile Creek; me and Aaron were.

123 I suppose you were on a trail?
A. Yes, sir; we were going along a trail; there is a trail over to the road there that goes past his mother's.
Q. You stopped and talked to him just a minute?
A. Yes, sir; 6 or 8 minutes.
Q. He unbosomed himself to you, and told you all this thing?
A. We might have stopped about 10 minutes, I reckon.

124 AARON CAREY, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Aaron Carey.
Q. Where do you live?
A. I live on Fourteen-Mile Creek.
Q. Do you know these defendants?
A. Yes, sir; I know them.
Q. How far do you live from Big Aleck?
A. I live about four miles from him.
Q. Were you up there when the body of Joseph Wilson was found?
A. Yes, sir.
Q. You were one of the parties that was along?
A. Yes, sir.
Q. Please state if you saw Hickory after that, you and anybody else with you?
A. Me and Bryant Hughes was together.
Q. Where did you see him?
A. Close to his mother's house; close to Hickory's mother's.

Q. When? Do you remember what day it was?
A. It was on Sunday, just a little after the killing was done.
Q. How close was he to his mother's house?
A. It was about a quarter; maybe not so far.
Q. Did you hear him say anything about this killing of Joseph Wilson, the deputy marshal?
A. He said he was the man that killed the man that shot the marshal.
Q. You heard him say that he was the man that shot the marshal?
A. Yes, sir.
Q. Who was he talking to?
A. Bryant Hughes.
125 Q. Did you hear him say anything else?
A. No, sir; I was sorter far of' from him, and I didn't understand him to say anything else.
Q. You were not right close to him?
A. No, sir.
Q. Tell all now that you can think of that he said, that you remember of his saying?
A. I did hear him talk a little about Tom, but I could not understand what he said.
Q. You heard him talk some about Tom Shade, the defendant, but you could not understand what he said?
A. No, sir.
Mr. BAR'ES (of counsel for defense). Of course it is understood that is not binding on Shade.
The DISTRICT ATTORNEY. You say you helped hunt the body; I believe you have stated that you were there when Mr. Paschal was there?
A. Yes, sir; he was along.
Q. You were with the crowd that helped to find the body, and went there to the house?
A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

Q. You and Hughes were walking along there together, and you met Sam walking, didn't you?
A. Yes, sir.
Q. You were just walking along in the trail, were you?
A. Yes, sir.
Q. You came up there together in the trail, just you three?
A. Yes, sir.
Q. Bryant was only 2 or 3 steps ahead of you; isn't that so?
A. He was about——
126 Q. That is, he was 6 or 7 steps from Hickory when he was talkin' to him?
A. Yes, sir; about that; maybe closer.
Q. About 6 or 7 steps from him when he was talking to him?
A. About that or closer; yes, sir.
Q. And then you were in two or three steps of Hughes, were you not?
A. Off from Bryant.
Q. You were a little further from Hickory than Hughes, but only two or three steps from him?
A. Yes, sir; maybe a little further.

Q. Let me see if I get it the way you tell it; you were coming along the trail there, and you met this man Hughes; was walking, and you met him walking along together.

A. Yes, sir; we were walking towards town.

Q. One after the other, or alongside of each other?

A. Side and side.

Q. You were walking along side and side and this man met you, and he was 6 or 7 steps from this man, or a little closer, I believe you put it now, and he was two or three steps from you—that is, Hughes?

A. Yes, sir; or further.

Q. It looks like you ought to have heard about as well as he did?

A. I was walking along slow——

Q. Because if he was far enough off to hear it 6 or 7 steps, it looks like you ought to have heard it as well as he did. All you know positive is that this man said to him that he is the man that shot the deputy?

A. Yes, sir.

Q. You didn't hear him tell Hughes that Tom Shade struck him with the axe, did you?

A. No, sir; I didn't hear him tell it, but I heard about Tom.

127 Q. You heard talk going around after that occurred. I am asking you about Hughes—you didn't hear him tell Hughes that Tom Shade struck him with the axe in the head?

A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. But you heard him say something about Tom you didn't understand?

A. Yes, sir.

128. JEFF OSAGE, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Is your name Jeff Osage?

Answer. Yes, sir.

Q. Do you talk English?

A. No, sir.

The witness was then examined through an interpreter, as follows:

Q. Ask him where he lives—how far from Big Aleck's.

A. He lives in Tahlequah, he says. He says he don't know Big Aleck.

Q. Ask him if he knows Sam Hickory.

A. Yes, sir.

Q. Ask him if he ever had any talk with Hickory about shooting the marshal, Joseph Wilson.

A. Yes, sir; he had a talk with him.

Q. When was it and where; how long after the killing of Wilson, and where was it?

A. He could not say just when it was, but it was right there after the killing.

Q. Where?

A. At a man's house by the name of Bird Sanders.

Q. Ask him what Hickory said about it.

A. He said he shot him.

Q. Tell him to go on and tell all that he said.

A. He sais Sam told him that he shot him, and he didn't kill him, though. An' he said that Tom Shade went and got an axe and knocked him in the head with it.

Q. Did he say how long after he shot him it was that Tom went and got the axe and knocked him in the head with it?

A. No, sir; he never said.

Q. If I understand you, this conversation was at Bird Sanders', and in the conversation Hickory told him that he had shot Wilson,

129 but didn't kill him, but Tom Shade——

Mr. BARNES (of counsel for defense). I move to exclude the latter part of that statement. It does not throw any light on Hickory, and it is liable to produce a misconstruction in the minds of the jury. Of course it is not competent on Shade. It seems to me this part of the conversation that is proof as to Hickory's conduct would be complete without that; it throws no 'ight on his conduct, the latter part of, and it might produce a misconstruction as to the attitude——

The COURT. I think it is competent as affecting him. Anything that shows that he had knowledge of the transaction, or that he was connected with it himself; the conversation is entire, and the Government is entitled to it as affecting him.

The DISTRICT ATTORNEY. Hickory would be entitled to have the whole conversation.

Mr. BARNES (of counsel for defense). As far as that is concerned Hickory does not deny that he shot under certain circumstances. That far, of course, we do not raise any point. We save an exception to the ruling of the court.

Cross-examination by Mr. THOS. H. BARES:

Where does he sa' this conversation was?

A. At Bird Sanders'.

Q. Where is Bird Sanders'?

A. He lives pretty close to Grand River, near the railroad; near the station; at the station.

Q. How far does this fellow live from Bird Sanders's?

A. About three miles east of Sanders's.

130 Q. How old is he?

A. He is growing on 19.

Q. Is he no kin to these Careys?

A. No, sir.

Q. Is he not a stepson of one of the Carey's?

A. Yes, sir.

Q. Does he know they are unfriendly with Hickory?

A. No, sir.

Q. Ask him how long ago this was he had this conversation.

A. He could not say just when it was.

Q. He does not know the day of the week or the day of the month?

A. No, sir; he sayes he do not know.

Q. He has told all he knows about it?

A. Yes, sir; he says that is all he knows about it.

Q. This man just up and told him that?

A. Yes, sir.
Q. Tel' him I reckon he knows what year it was.
A. Yes, sir.
Q. What year was it?
A. He says it was in 1892.
Q. If he says it was in 1892 this conversation happened, tell him to stand aside.

Redirect examination:

The DISTRICT ATTORNEY. Ask him what it was that occurred in 1892 hat he is talking about?
A. He says there was n&t anything occurred.
Q. Ask him if he meant this was in 1892 that he saw the man?
A. Yes, sir; he said he meant 1892.
Q. That what was 1892?
A. This occur'ence.

131 PRICE COCHRAN, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Price Cochran.
Q. Do you know these defendants—the men who go by the name of Hickory and Shade?
A. Yes, sir; I know them both.
Q. You are an Indian, are you?
A. Yes, sir.
Q. Do you know the handwriting of Hickory?
A. Yes, sir.
Q. The letter that I now hand you is one written in the Cherokee alphabet; state if that is in Hickory's handwriting.
Mr. BARNES (of counsel for defense). Have you got a copy of it in English?
The DISTRICT ATTORNEY. No, sir.
Mr. BARNES (of counsel for defense). I don't know how we could determine as to its competency unless we had a copy of it to see whether we would object to it or not. I do not know whether it is competent.
The DISTRICT ATTORNEY. You will have to take the interpreter off and have it read to you if you want to know what it is. [To the witness]. Whose handwriting is that?
A. It is Sam Hickory's.
Q. Have you ever seen that letter before?
A. Yes, sir.
Q. Where did you see it?
A. I saw it down there at Walker Carey's house.
Q. Who did you first see it with?
A. Ollie's mother gave it to me.
132 Q. The defendant's wife's mother?
A. Yes, sir.
Q. What is the name of the mother?
A. I don't know the name in English, but it is Mrs. Catcher in Cherokee.

Q. She had that letter?
A. Yes, sir.
Q. Did you get the letter?
A. Yes, sir.
Q. Who did you get it from?
A. I got it from Mrs. Catcher.
Q. What did you do with it when you got it?
A. I showed it to Ollie——
Q. Who did you give it to?
A. Old man Dyer.
Q. This letter you say is in Sam Downing's handwriting?
A. Yes, sir.

The DISTRICT ATTORNEY (to the court). This letter is written in Cherokee, and I have had it read to me. If the gentlemen representing the defendants want to see the letter they can take the interpreter off and have it read to them. I will offer it in evidence, but I now hand the letter to them.

Mr. BARNES (of counsel for defense). We would like to take him out and have it interpreted. There are several grounds of objection. He offers that letter from this man to his wife; that is a communication between husband and wife, and that may affect it.

(With the permission of the court counsel retired to have letter above referred to interpreted. When they returned the following proceedings were had:)

The DISTRICT ATTORNEY. If your honor please, I turn the witness over for the purpose of cross-examination upon this letter now, and then I will offer it after they get through with him.

133 Cross-examination by Mr. THOS. H. BARNES:

How long have you known Sam Hickory?
A. Ever since he was a little boy.
Q. How close did you live to him?
A. About three or four miles. I moved back down this way——
Q. You say you know his handwriting?
A. Yes, sir.
Q. You never saw him write much, did you?
A. I have seen him lots of times.
Q. Where?
A. Anywheres in the Nation. They write there in the Nation. I have seen him lots of times.
Q. These letters are kind of printed letters, are they not? They are more like print than anything else, are they not?
A. No, sir.
Q. You say you know that to be his handwriting?
A. Yes, sir.
Q. Have you got any of his handwriting here?
A. I don't know.
Q. Did you ever compare this with any other handwriting of his? You have got no other writing of his here except this, you say?
A. Yes, sir; that is his.
Q. How often did you ever see this man write? Did you ever see him take a pencil and pen and write?

A. Yes, sir; sometimes.
Q. How long ago?
A. It is a good while now; it is a little over a year now.
Q. How many times did you ever see him write?
A. I can't tell.
Q. Twice?
A. I can't tell how many times.
Q. Twice?
A. More than that.
Q. You and he didn't run together, did you?
A. No, sir.

134 Q. Do you think you would know this from any other Cherokee letter written by anybody else?

A. I don't know; I think I would.

Mr. BARNES (of counsel for defense). We except to the introduction of the letter.

It is agreed that the interpretation of the letter as obtained by counsel when they retired to examine the letter be read as the contents of the letter. The same was read to the jury by the district attorney as follows, to wit:

"OCTOBER 15TH, 1891.

OLLIE: I write you a few lines. You must never disclose how this is about Tom Shade. Just say that I was the only one that did it. You must never tell anybody that he killed the horse and all that he done. I tell you you must not. That is all now. I write in haste.

SAM."

Q. Ollie was Sam's woman, was she not?
A. Yes, sir.

Mr. BARNES (of counsel for defense). Did you ever get any letters from Sam yourself?

A. No, sir.
Q. How do you tell this from any other Cherokee writing? How do you distinguish this from any other Cherokee writing?
A. There is a difference in our writing, a difference in the Cherokee; there is good hands, and some not much good hand.
Q. This does not look like writing in our language; it is more printed than anything else. They are printed letters, are they not?
A. No, sir.
Q. They are capital letters?
A. No, sir.

The DISTRICT ATTORNEY. They are Cherokee characters.

Mr. BARNES (of counsel for defense). Can you tell how you dis-

135 tinguish between different handwritings in Cherokee?

A. There is a difference between the different hands; some bad hands, some good hands, and sometimes not much good hands.
Q. You never had a letter from this man in your life?
A. No, sir.
Q. Did you ever see him write a letter to anybody?
A. Yes, sir.

Q. Where?
A. Anywheres in the Cherokee Nation.

136 THOMAS GALCATCHER, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. What is your name?
Answer. Tom Galcatcher.
Q. Where do you live?
A. About fifteen miles north of Tahlequah.
Q. Do you know Sam Hickory here?
A. Yes, sir.
Q. Do you know Tom Shade?
A. Yes, sir; I know him when I see him.
Q. Did you ever have a talk with Tom Shade about the killing of the man named Wilson up there, a marshal?
A. Yes, sir; I was there about four or five days after he was under arrest going to Tahlequah.
Q. At Tahlequah you saw him?
A. Yes, sir.
Mr. BARNES (of counsel for defendants). Do you talk English?
A. Yes, sir.
Q. Have you ever been convicted here for larceny?
A. No, sir.
Q. Are you in jail now?
The DISTRICT ATTORNEY. That is not competent proof now.
Mr. BARNES. You have never have been tried here for larceny or anywhere else?
A. No, sir.
The DISTRICT ATTORNEY. You saw Tom Shade a short time after he was arrested, four or five days?
A. Yes, sir; as well as I recollect of; I could not exactly say.
Q. Where did you see him?
A. I seen him at Tahlequah. Dave Rusk had him under arrest there.

137 Q. Did he at that time make any statement to you as to how this marshal was killed?
A. He did talk about it.
Q. What did he say about it?
A. He said he heard there was a man killed up there and he went up there.
Q. Went where?
A. To Sam Hickory's, I reckon. He didn't say where it was; he heard there was a man killed down there and he went down there.
Q. Then what?
A. He said he went there and went around there where he was, and he said he found a man laying there, and the man spoke for some water, and he said he would not get him any water.
Q. Then what?
A. Then he said he told him "QAll you men ought to be taken out of here."
Q. He said he said that to the man?

A. Yes, sir.
Q. Then what?
A. And he said he cussed him then.
Q. Go on and tell what he said.
A. He said he cussed him there; said that tman told him, "Oh, don't kill me; just give me a drink of water;" and he said, "No, I won't give you any drink of water; I will give you this axe." That is about all he said.
Q. Give him this axe?
A. Yes, sir.
Q. Did he say whether or not he killed him?
A. He said he was the one that done it; he was laying there on the pallet when he said it; I was guarding him that night.
Q. He said he found the man and he was not dead?
A. Yes, sir.
Q. You say you and he were laying on the pallet together when he told you that?
A. Yes, sir; at the marshal's camp.
Q. You told Mr. Barnes you were in jail; what are you in jail for?
A. I was in jail down to Muskogee for whiskey, the same whiskey I came here and plead guilty to.
Q. They have you in jail for that same whiskey?
A. Yes, sir.
138 Q. You were brought to the jail here from the Muskogee jail?
A. Yes, sir.
Q. You were subpœnaed and brought down here from that jail?
A. Yes, sir; I could not get here the same day I was subpœnaed, for the reason I was in jail.
Q. You are there on a charge of introducing whiskey?
A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

Q. You say you are just here on the same whiskey tha' they had you on at Muskogee and you plead guilty to?
A. Yes, sir.
Q. When was that?
A. I think this last fall—well, it has been a year pretty near now, as well as I recollect.
Q. That was in 1891?
A. Yes, sir.
Q. You plead guilty here in 1889 of introducing and selling whiskey, didn't you?
A. I came here and plead guilty to it.
Q. How often have you been here on whiskey?
A. I ain't been here but twice.
Q. Are you sure that is all?
A. Yes, sir.
Q. When you told the district attorney that you are here on the same whiskey you are at Muskogee on, you are not referring to the first time you were here for whiskey. You were here away back in 1889, convicted of selling and introducing whiskey three years ago?
A. Yes, sir.
Q. And then you have been up since that?

A. Yes, sir.

139 Q. Where do you live up there?

A. I live about 15 miles north of Tahlequah.

Q. What night was it that you say you had this talk with Shade?

A. I don't know what night it was.

Q. You guarded him the first night that he was brought in there, didn't you?

A. It was four or five days, I think it was.

Q. You guarded him four or five days?

A. No, sir.

Q. How many nights did you guard him?

A. Only one night.

Q. This talk was in the night?

A. Yes, sir.

Q. Were you laying there on the pallet with him?

A. Yes, sir.

Q. Did you have him chained?

A. Yes, sir; they had him chained to another fellow.

Q. He was chained to Aleck?

A. Yes, sir.

Q. Chained to Aleck Stock, was he?

A. Yes, sir; I think that is his name; I don't know.

Q. What time of night was it?

A. I could not say for certain what time of night it was.

Q. Did you go and lay down in the bed with the prisoners who were chained together?

A. I was laying close by near the pallet.

Q. You were not laying on the same pallet?

A. Yes, sir; I was laying down close by him on the same pallet.

Q. You were laying at his feet, I reckon; you were not alongside of him where he could get the pistol?

A. I never had any pistol on. I had a Winchester and I left it at the other guard's; there was three of *is* guarding them.

Q. All of you guarding him at once?

A. There was two of them.

140 Q. Where was that other guard?

A. They were right there, standing there or setting around.

Q. You were talking Cherokee, I suppose?

A. Yes, sir.

Q. And him and old Aleck were laying there chained together?

A. Yes, sir.

Q. You were laying on the same pallet?

A. Yes, sir.

Q. He knew he was charged with this thing, and he up and told you all about it?

A. Me and him was talking there, laying down, and we talked a good while there.

Q. Is that the way you guard prisoners?

A. No, sir.

Q. Without any arms, you go and lay down beside of a fellow to hear him confess?

A. No, sir; I never had no arms.

Q. You were guarding him, and he knew he was charged with this offense?

A. Yes, sir.

Q. Old Aleck lay off on the far side from you?

A. Yes, sir.

Q. He wasn't between you, was he?

A. No, sir.

Q. There in the National prison?

A. Yes, sir; it was in the night.

Q. Was it in the National prison or in the camp out from town?

A. It was in the marshal's camp.

Q. Then it wasn't at the National prison; you were mistaken about that? It was four or five days; now, you are sure about that?

A. I think so, but I could not swear for certain it was four or five days.

Q. Don't take it back on me; four or five days after this man was brought there a prisoner when you guarded him at night?

A. Yes, sir.

Q. There was only those two guards in the camp, was there?

141 A. Yes, sir; that is all.

Q. Do you know how long these men were chained together there?

A. No, sir; they had them at first, I guess, when I got there in the daytime between 10 and 11 o'clock; I got into Tahlequah there then. They were both handcuffed together then.

Q. They put chains on them that night?

A. Yes, sir.

Q. Were they handcuffed and chained both when this happened?

A. No, sir; they were just chained together. We taken the handcuffs off.

Q. A lock on them, I reckon?

A. Yes, sir.

Q. I suppose when he told you this you told him you would help him out; be a good friend of him?

A. No, sir.

Q. And break that lock if you got a chance?

A. No, sir; I never told him nothing.

Q. Are you sure you didn't?

A. Yes, sir.

Q. Didn't worm it out of him?

A. No, sir.

Q. He just up and told you?

A. Yes, sir; he came around and told me after awhile. We were talking there, deviling one another laying down there.

Q. Was he joking?

A. Me and him was joking.

Q. Do you think he was joking when he told you that?

A. I do not know whether he was or not.

Q. You rather think he was?

A. No, sir.

Q. You thought he was joking at the time?

A. No, sir; I could not say for certain whether he was joking or not.
Q. You were deviling and joking?
A. Yes, sir.
Q. You told him about the fellows you had killed, didn't you, and the whiskey you had taken in?
A. No, sir; I didn't.
142 Q. And the women you had captured?
A. No, sir.
Q. You got very confidential, I suppose, and you told about some of your performances, I suppose?
A. I cou'd not say for certain. We were talking about women and one thing and other like that.
Q. You were not talking about whiskey?
A. We talked a little about it.
Q. Anything else?
A. I think that is all it was.
Q. Ain't you guessing at that to get rid of me?
A. No, sir.
Q. You said awhile ago you could not remember what you joked about and now you remember it. You are just saying that to get rid of me, are you not? What lead up to this conversation; you said awhile ago that he just up and told you; will you stick to that?
A. I don't think I said that for certain while ago.
Q. Do you know what time of night it was?
A. No, sir; I could not say for certain; it was about 10 or 12 o'clock.
Q. Did you have a watch?
A. No, sir.
Q. Was it moonlight?
A. No, sir; I don't think the moon had come up; there was a little fire there, and the marshals put in a little brush once in awhile.
Q. How many guards?
A. Three of us there.
Q. Your gun was setting away off?
A. I handed it to a deputy marshal there.
Q. You said it was four or five nights after the arrest; could you tell us what night of the we'k it was?
A. No, sir; I do not recollect what time it was in the week.
Q. The most you can tell it was four or five nights after that, after they had been brought there?
143 A. Yes, sir; as well as I recollect it was about four or five nights after.
Q. Was it not on Wednesday night, the first night these men was brought there, that you guarded him?
A. No, sir; I don't think it was, because Dave Rusk had him under arrest four or five days when I came there.
Q. You do not think it was four or five days?
A. No, sir.
Q. You don't think it was Wednesday night?
A. No, sir.
Q. You don't know what night in the week it was?
A. No, sir.

Q. The most you can say is it was four or five days after, and you guarded him one night?

A. Yes, sir; and part of the evening; Dave Rusk put me on——

144 By agreement the testimony of the following witness for the defense was taken at this time:

ELIAS C. BOUDINOT, having been duly sworn upon behalf of the defense, was examined by Mr. Thos. H. Barnes, and testified as follows, to wit:

Question. Do you know these defendants?

Answer. Yes, sir; I know Shade; I am not acquainted with Hickory.

Q. Where do you live?

A. I live in Tahlequah, Cherokee Nation.

Q. What is your occupation?

A. I am a lawyer, and a farmer and stock-raiser.

Q. Do you know Thomas Shade?

A. Yes, sir.

Q. Do you know Hickory?

A. No, sir; I have seen him, but I was not acquainted with him.

Q. How long have you known Shade?

A. He has lived there in Tahlequah district, and I have known him off and on ever since he was a boy, small boy; he is a boy yet.

Q. Do you remember of the occur'ence of the killing of this deputy marshal up there, the time it is said to have been?

A. Yes, sir; I heard it before they discovered his body, several days; everybody seemed to close their mouths about it, and I heard it Wednesday afternoon, I think, and the man was said to have been shot Tuesday. That is not my own memory as to the day the man is said to have been shot; I don't remember the day of the month.

Q. The point I want to get at is if about that time you saw
145 Shade there in Tahlequah?

A. Yes, sir.

Q. Tell us when it was that you saw him?

A. I saw him in the town of Tahlequah before noon; it could not have been earlier than 11 o'clock, or later than one, on the day that the man was said to have been shot.

Q. Do you know the day of the week?

A. I know it now; I could not recollect it from my own memory.

Q. But you fix it by the time that you learned that he was shot, the day you learned that he was shot?

A. Yes, sir.

Q. If I understand you, by putting that event with seeing him together you know that it was that day you saw him there?

A. Yes, sir; on the day that the man was shot I saw him there about noon, on the street there. What particularly called my attention to Shade—I am not in the habit of noticing him particularly—I had gone on his bond to get him out for the election up there, and that was the first time I seen him from the time that I went on his bond.

Q. Bond for what?

A. A whiskey case down here at Fort Smith. He was in jail and I was one of his bondsmen, and I called his attention to the fact and told him to be back here at the time set.

Q. Did you see him after that time; did he come to you in regard to this case, in any way, or for advice?

The DISTRICT ATTORNEY. You need not state anything that he said to you. His conversation with you would not be competent.

Mr. BARNES (of counsel for defense). When did you next see him?

A. Several days after the killing; I can't place the time, but
146 he and his father came to me and wanted to make some arrangements about surrendering him. I told him if the boy was not guilty to send him in as soon as he could.

Q. Did the boy come to you after that?

A. Yes, sir; in the town of Tahlequah.

Q. What day was that?

A. A few days afterwards.

Q. Did you talk with him about this case?

A. Yes, sir.

Q. What did you advise him to do?

A. I advised him to surrender, and I went and surrendered him to Dave Rusk.

Q. I will ask you this question, and do not answer before the court rules on it: He come to you about the case, and his father had been to you before, and he talked to you about it, and you advised him to surrender; did he or not tell you whether he had any connection with it?

The COURT. That is not competent.

Cross-examination by the DISTRICT ATTORNEY:

Q. You think it was before noon on Tuesday; if the killing was on Tuesday, you think it was before noon upon that day you saw him?

A. Yes, sir.

Q. You then didn't see him again for several days afterwards; was he armed when you saw him the next time?

A. Not that I know of; I don't think he was. It was abo't noon in the town of Tahlequah, near Bob French's house, and he came right in town to see me about arrangements——

Q. That was after the killing, during the excitement?

147 A. Y's, *Yes*, sir; after the finding of the body and the connection of his name with the killing.

Q. On the day of the killing you had a talk with him about his bond, and told him to be on hand here; I believe you state that?

A. Yes, sir; that is how I recollect it.

Q. Did he leave town immediately after talking with you?

A. I don't know; he was riding down Main street, I believe, or was in front of the post-office.

Q. Where did he live?

A. Somewheres down on 14-mile creek, in that neighborhood; I don't know where particularly he did live. The Shades have been associated with the 14-mile creek neighborhood with me; that is all I know about his residence.

148 DAVE RUSK, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. You have been on the stand before?
Answer. Yes, sir.
Q. I believe you stated that you arrested Shade?
A. Yes, si'; he was turned over to me by Boudinot.
Q. I will ask you if you had old man Big Aleck under arrest at that time?
A. Yes, sir.
Q. Do you know Jim Gallcatcher?
A. Yes, sir.
Q. Please state if you had him guarding there for you.
A. I had him guard there that night and part of the day, or all day. I don't remember exactly how long; but one night, I know.
Q. Do you know which night it was, or could you tell; how long did you have them there at Tahlequah?
A. I held them four or five days.

Cross-examination by Mr. THOS. H. BARNES:

What night did you have him; do you remember? How many nights did Gallcatcher guard them?
A. Only one night, and I think part of a day.
Q. Do you remember what night that was?
A. No, sir; I don't.
Q. Do you remember what day you got there?
A. No, sir; I had him go there one evening to guard until the next day—until I came *came* back. I went after Hickory; I was hunting for him.

149 LUCY CAREY, having been duly sworn upon behalf of the Government, was examined by the district attorney, through Interpreter Walkingstick, and testified as follows, to wit:

Question. Ask her if she talks English.
Answer. She says she does not.
Q. Ask her what her husband's name is.
A. Hogshooter, in Indian; and in English it is John Carey.
Q. She, then, is John Carey's wife?
A. Yes, sir.
Q. Ask her if she knows Tom Shade.
A. Yes, sir; she has known him from a little child.
Q. Does she know the other defendant, Hickory?
A. Yes, sir; she has known him about the same length of time.
Q. She has known them both?
A. Yes, sir.
Q. Ask her if she remembers a marshal by the name of Joseph Wilson being killed upon Fourteen Mile Creek, not very far from where she lives.
A. Yes, sir; she recollects of it.
Q. Ask her if she remembers the day of the week that he was killed or is said to have been shot.

A. It was on Tuesday, she reckons.

Q. Ask her if she saw Tom Shade after that; and if so, on what day she saw him.

A. Yes, sir; she saw Tom Shade along there by the house on Thursday morning.

Q. What time on Thursday?

A. In the morning.

Q. What time in the morning?

A. Tolerable early Thursday.

Q. Going where?

A. He was going in the direction of Tahlequah.

Q. By her house in the direction of Tahlequah?

A. Yes, sir.

150 Q. Did he have any arms?

A. Yes, sir; he had a gun.

Q. Did he say anything to her?

A. He said "Good morning," and that is all about when he first passed there.

Q. Passed by going towards Tahlequah?

A. Yes, sir.

Q. That was on Thursday morning early?

A. Yes, sir.

Q. How far does she live from Big Aleck Stocks, over where this marshal was killed?

A. She says she guesses it is about three miles, or maybe four.

Q. Ask her if he was by himself at that time.

A. Yes, sir; he was alone the first time that he passed.

Q. When did she next see him?

A. Late in the evening.

Q. Night of the same day, I reckon?

A. Late Friday evening.

Q. The next day?

A. Yes, sir.

Q. Which way was he going then?

A. In the same direction he went the other day.

Q. Towards Tahlequah?

A. Yes, sir; on the road leading to Tahlequah, going in that direction.

Q. Did he stop?

A. Yes, sir; she said he stopped and staid there until about sundown.

Q. Did he get off the horse?

A. No, sir.

Q. Was he armed or not?

A. Yes, sir.

Q. What did he have?

A. He had a Winchester.

Q. Was he by himself?

A. Yes, sir.

Q. Did he have any talk with her about hickory?

A. Yes, sir; they talked there for some time, and he talked about it.

Q. What did he say?

A. And she says "In our conversation he would bring in some
151 one's name every now and then," and he said if he got into any trouble, or anything like that, that he would help him, stay with him——

Q. Tell her I want her to give his exact language, if she can.

A. And that he said he would stay with him until they died or fell.

Q. I didn't quite get that; tell her to repeat that again.

A. She says that he said that if there should be something happen to somebody, or that he should do anything he would be with him until he died, and that they were brothers.

Q. What became of him? What did he do after he left there?

A. She says he staid there until about sundown; she says when he left he hadn't gone very far until she heard a shot fire.

Q. Then what?

A. And just right away after he shot down there, about dusk, she saw him and this other man going along down the hil'.

Q. The other man, Hickory?

A. Yes, sir.

Q. That is, right away after the shooting?

A. Yes, sir.

Mr. BARNES (of counsel for defense). About dusk?

The DISTRICT ATTORNEY. Yes, sir; that occurred about dusk. She says he stopped there until after sundown. (To the interpreter.) Ask her which way they were going?

A. They were in the road that goes towards Fort Gibson, going in that direction.

Q. Shade came to her house by himself, and after he left he fired a shot, and Hickory got with him, and then the two rode off together?

A. Yes, sir.

Q. Ask her if she saw the marshal when he came to her house and her husband went off with him.

A. Yes, sir; she says she saw him when he came to her house, and she says it was nearly 12 when he came there, and he eat his dinner there and then they went off.

152 Q. Was he in his short sleeves or did he have his coat on?

A. No; he didn't have his coat on.

Q. Ask her if she saw his coat?

A. Yes, sir.

Q. What kind of a coat was it?

A. It was a smal', checked coat.

Q. Ask her if she ever saw the coat afterwards.

A. Yes, sir.

Q. Where did she see it?

A. Tom Shade had it on.

Q. When he was at her house on Thursday or Friday?

A. Yes, sir; on Friday.

Q. That was on Friday that she saw Tom?

A. Yes, sir.

Q. Did she say that the marshal eat dinner at her house?

A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

What kind of a looking man was the marshal?

A. Just a right young man; tolerable low; not very tall.

Q. Where did he have his coat when he was on his saddle?

A. Yes, sir; it was on his saddle. He hitched his horse to come in the house, and his coat was tied on the saddle.

Q. He came in the house and eat dinner in his shirt sleeves; is that the way of it?

Yes, sir; he didn't have a coat on.

Q. His coat was tied behind the saddle, I suppose?

A. No, sir; in front.

Q. Ask her if she is not mistaken about that; if it was not behind.

A. No, sir.

153 Q. It was tied there in front, she says?

A. Yes, sir.

Q. Rolled up?

A. Yes, sir.

Q. Wrong side outwards?

A. Yes, sir.

Q. Tied in a roll?

A. In front of his saddle, rolled up.

Q. Wrong side outwards?

A. Yes, sir.

Q. I suppose she was working about the house—about the dinner—and looked out and saw the horse standing with the coat on it?

A. Yes, sir; he had been there for some time before she commenced to make preparations for getting dinner, and he had his horse tied right close to the house.

Q. What time of day did they eat dinner there?

A. She says noon—just at 12:00.

Q. This was a kind of a brown looking, checked coat, was it not?

A. Yes, sir; and the vest was of the same color.

Q. Ask her if she does not know that Tom Shade here owned a brown coat at that time?

A. No, sir; when he was down on Thursday he had on a different coat.

Q. Ask her if he didn't have a brown coat?

A. She says it was kind of nearly yellow—red is what she says in Cherokee; it was an old coat.

Q. Is that the kind that he had on Thursday?

The DISTRICT ATTORNEY. Didn't she say a kind of an old brown coat that he had on?

The INTERPRETER. Yes, sir.

Mr. BARNES (of counsel for defense). What kind of a coat did he have on Thursday?

A. It was this same coat; old brown coat.

Q. Same one he had on Friday?

A. No; I can't hardly—it was an old coat, and faded.

154 Q. Ask her this: If the coat he had on both times wasn't similar.

The DISTRICT ATTORNEY. Mr. Clarke (referring to a Cherokee witness in the case sitting beside him) says that she said the old coat was pretty much the same color as the new one he had on Thursday.

The INTERPRETER. She says no; she says not. She says there was a great deal of difference in the coats; she noticed right away when she saw this other one on; there was a tore place in here; wore out.

Mr. BARNES (of counsel for defense). Tel' her there is a difference between the way she said it, according to your interpretation, and Mr. Clarke's. (To Mr. Clarke) How did you understand it?

Mr. CLARKE (a witness and a Cherokee). I understood her to say that they were pretty much the same color, only one was older than the other.

Mr. BARNES (of counsel for defense). Thursday where was it she sa' Tom?

A. At her house.

Q. Was he a horseback then?

A. Yes, sir.

Q. Didn't stop but a minute, or did he stop?

A. No, sir; he didn't stop.

Q. He passed her house on the Tahlequah road?

A. Yes, sir.

Q. How far does she live from Big Aleek's?

A. Three or four miles.

Q. What di'ection does she live from Big Aleek's?

A. She says she lives this way, in the direction of Fort Gibson.

155 Q. Ask her if it is not five or six miles from her house to Big Aleek's.

A. No; she don't know; it may be further, but she don't know.

Q. What time of day was it when she saw him?

A. On Thursday; it was in the morning; early part of the day.

Q. What time in the day?

A. She could not say just what time it was; it was in the early part, in the forenoon.

Q. Was it in the middle, or towards noon, or first part, or how?

A. It wasn't so very early she says. The sun was up about that distance [indicating] she says.

Q. About what time of day would that make it?

A. She could not say, but it was sometime after breakfast time—that is, the time th't the people eat breakfast.

Q. How many hours was the sun high? Could she tell whether it was an hour or how high it was, or how about that?

A. No, sir; she could not say; she never noticed.

Q. Sometime after breakfast?

A. Yes, sir.

Q. Ask her if the sun wasn't up quite a distance?

A. She says it was between sunup and 12:00.

Q. Ask her if it wasn't about noon.

A. No, sir.

Q. About the middle of the day?

A. From sun up to 12:00.

Q. When she saw him over there and claimed to have had this talk with him, ask her if the sun was down, or was it about down, at that time?

A. It was sundown.

Q. He talked with her just a little while, did he not?

A. The' talked all the time that he was there; all the time that he staid here. She says she went down to the spring after water, and when she came back he was standing there with his horse.

156 Q. She says he went some distance before he fired off his gun; how far did he go before he fired off his gun? As far as from here to that building over there (referring to old court building and jail)?

A. Yes, si'; she supposed it was about that far; it could not have been much further than that.

Q. Ask her if it wasn't two or three hundred yards, nearly a quarter?

A. No; she says she does not know anything about yards; didn't measure it.

Q. Tell her she knows what a quarter of a mile is, and half a mile; ask her if it wasn't about a quarter of a mile?

A. No, sir; she says she don't know very well.

Q. Well, it was some distance?

A. It wasn't very far, she say'.

Q. Does she say it was a little further than the jail building over there?

A. Just about that far.

Q. Just about as far as from the court-house to the jail?

A. Yes, sir.

Q. Ask her if she saw him shoot, or just heard the report and looked that way?

A. No, sir; she didn't see him shoot; she just heard the report.

Q. He had gone about that far and she heard the report of a gun, but she didn't see who shot it; is that it?

A. Yes, sir.

Q. After she heard that how far did he go until she saw another man going towards him?

A. It wasn't very long afterwards; just a little while afterwards; just in time if he had any agreement to meet anybody there to come around and get together.

Q. There was sometime between the shot and the time the men got together?

A. It was just about getting dusk, she said.

157 Redirect examination by the DISTRICT ATTORNEY:

Q. She says the coat was tied to the horse—the marshal's coat—on the saddle, wrong side out; ask her how she could tell it was the same coat that Shade had afterwards, if it was turned wrong side out?

A. She says the outside was out about that much, and then by his vest he had on. She says when she saw Tom have it on it was the coat.

Q. Thought it was the same coat?

A. Yes, sir.

Q. She saw where it was rolled up, a portion of the outside of the coat?

A. Yes, sir; a little part.

Q. It was the same as his vest?

A. Yes, sir.

Q. He had a vest on when he was eating dinner?

A. Yes, sir.

Q. When she saw Tom he had on the same kind of a coat as that?

A. Yes, sir; she thought so.

158 NEAL NUGENT, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Neal Nugent.

Q. Where do you live?

A. I live at Tahlequah district, Cherokee Nation.

Q. How far from Tahlequah?

A. I live about 18 miles west of Tahlequah.

Q. How far from Big Aleck's?

A. I reckon about three or four miles.

Q. How far do you live from John Carey's?

A. I live about two miles from him.

Q. How far does John Carey live from Big Aleck?

A. I could not say exactly; it must be, though, about 4 or 5 miles, I reckon.

Q. The witness last on the stand was John Carey's wife, is she not?

A. Yes, sir; I think she is.

Q. Do you know Tom Shade and Hickory, these two defendants?

A. Yes, sir.

Q. You remember the time that Joseph Wilson, the deputy marshal, is said to have been killed?

A. Yes, sir; I do.

Q. What day was it?

A. It was on Tuesday, I believe.

Q. Please state if you saw the defendants, either one of the defendants, either upon that or the next day, either on Tuesday or Wednesday?

A. Yes, sir; I saw Tom Shade next day, on Wednesday morning.

Q. Where did you see him?

159 A. I saw him at Sarah Welch's, right close there.

Q. How far is Sarah Welch's from Big Aleck's?

A. It is about three or four miles, I reckon, as near as I can guess at it.

Q. What was he doing there?

A. I do not know; me and Joe Keener was riding along the road.

Q. Go on and state all about it; where were you going?

A. We were going over on Double Springs Creek, as they call it.

Q. When you got to Sarah Welch's what occur'ed?

A. We were passing by there, about 150 yards from the house, and he came out to the road.

Q. How did he come?

A. He was riding.

Q. Did he have any arms?

A. No, sir; I don't think he did; if he did I never saw them.

Q. Did he stop and talk with you?

A. Yes, sir; he stopped awhile.

Q. Was he by himself?

A. Yes, sir

Q. Do you remember what he said, what he was talking about?

A. No, sir; I don't know what he was talking about; it was him and Joe Keener that was talking.

Q. What time Wednesday morning was it you saw him at Sarah Welch's?

A. It was about 9 or 10 o'clock, I reckon.

Q. What direction is Sarah Welch's from Big Aleck's?

A. It must be pretty close south from there, I reckon; kind of southwest.

Q. How far did you say it was from Aleck's?

A. It was about three or four miles, as near as I can guess at it.

Q. You say that he was by himself, and that was Wednesday morning about 9 or 10 o'clock?

A. Yes, sir.

160 Q. Did you see anything of the other defendant, Hickory, that day or any time after that?

A. No, sir; I didn't see him after that until I came down here.

Q. Did you have any opportunities of seeing him if he had been at home? If he had been at home would you have had opportunity of seeing him?

A. I guess I would.

Q. You never saw him any more after that?

A. No, sir.

Q. How far do you say you lived from him?

A. I lived about three miles, I reckon.

Q. You never saw him any more until after he was arrested?

A. No, sir; until after I came here.

Q. Where did he live prior to the killing?

A. He staid there at Aleck's sometimes, and he was raised there I suppose.

Q. Did he stay there after the killing?

A. I don't know.

Q. You saw nothing more of him, you say?

A. No, sir; I never saw anything more of him at all.

Q. Where did Tom Shade live?

A. I could not tell you where he lived at all.

Q. None of you seem to know where Tom Shade lived?

A. I don't know where he lived.

Q. Did he have any permanent place where he did live?

A. I do not know whether he did or not.

Q. Where did his father live?

A. Up on the other side of Tahlequah somewhere, I don't know where he lived. I never was up at his house since he moved off; he used to live close to where I did on Fourteen Mile Creek, and then he moved off.

Q. Was Tom a married man—Tom Shade?

161 A. I don't know whether he was then; they say he was; that is all I know, just what people tell me.

Q. Where did his wife stay?

A. I don't know where she staid either.

Q. You are a Cherokee Indian, are you not?

A. Yes, sir.

Cross-examination by Mr. THOS. H. BARNES:

About what time of day was it when you saw Tom?

A. About 9 or 10 o'clock.

Q. Are you not mistaken in the day? Was it not Thursday morning and not Wednesday morning you saw him?

A. No, sir; it was Wednesday morning.

Q. Do you know where John Johnson lived up there?

A. I never was at his house; I know pretty near, though, where he lived.

Q. How far is it from there where you saw him?

A. It was about 6 miles I reckon, five or six miles.

Q. Was it not about 4 miles, or do you know accurately enough to state exactly?

A. No; I can't say exactly how far it was.

Q. It might have been not over 4 four miles? It might have been five or six or it might have been four, if you do not know.

A. I could not say exactly how far it was; it might have been.

Q. This place where you saw him was about 5 or 6 miles from Aleck's Stocks, wasn't it?

A. No, sir; about three or four miles from Aleck Stocks.

Q. Is he the man that is here?

A. Yes, sir; he is here.

Q. Where were you going?

A. I was going to hunt my horse over on Double Springs Creek about 8 or 10 miles from there.

162 Q. Where did you live?

A. About a mile and a half above where I saw him, on the edge of the prairie.

Q. Is Johnson a brother-in-law of this defendant, Tom Shade?

A. I don't know whether he is or not.

Q. You were out horse hunting that day?

A. Yes, sir.

Q. Did you have a bridle with you?

A. No, sir; I took a rope.

Q. What was Keener doing; was he helping you?

A. He was going with me to help me hunt the horse.

Q. Did he live with you?

A. No, sir.

Q. Where had you gotten together?

A. At my house; he came there on Friday and staid until the next Sunday, I believe, before he went home.

Q. Came there on Friday and staid until the next Sunday?

A. Yes, sir.

Q. Then it must have been Saturday that you met the man; it must have been Saturday that you met the man, this defendant?

A. No, sir; he came there on Friday and staid a week there.

Q. Then you mean Sunday week?

A. Yes, sir; I mean Sunday week.

Q. What Keener was it?

A. Joe Keener.

Q. You had breakfast that morning, I suppose, and knocked around some before you started out to hunt?

A. Yes, sir.

Q. As to the exact hour in the morning, you Indian people do not pay much attention as to whether it is 8 o'clock, or 9 o'clock, or 10 o'clock; you say that the sun is up so much, or something of that sort, do you not? You say that the sun is here when a certain thing happened; you do not tell by the time, by the clock?

A. Yes, sir; some of them do.

Q. Then you can say exactly as to the hour?

A. No, sir.

163 Q. It was pretty well in the morning?

A. Yes, sir; I guess it was about 9:00 or 10:00 o'clock.

Q. The sun pretty well up?

A. Yes, sir.

164 JOSEPH KEENER, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is Joseph Keener?

Answer. Yes, sir.

Q. Where do you live?

A. I live in the Cherokee Nation.

Q. Are you any relation to Tom Shade or Hickory?

A. No, sir.

Mr. BARNES (of counsel for defense). We do not think we have had service of the notice of the intention of the Government to use this witness, and so we object to his testimony.

The DISTRICT ATTORNEY. His testimony is cumulative anyway, so I will let him stand aside.

Here court took a recess until 1:30 p. m.

Government rests.

165 Thereupon the Government closed its case in chief.

The defendants, to maintain the issues upon their part, produced and examined the following-named witnesses, to wit: Isaac Shade, Peggy Shade, John Johnson, Arch Downing, Bryant Hughes, Aaron Carey (recalled), Thomas Keene, Joe Shade, Mack Quinton, Dave Downing, Sam Downing (defendant), G. W. Benge, Phillip Bennett, Ollie Williams, Aleck Stock, Jim Squirrel, William Taylor, C. L. Bowden, Dave Rusk (recalled), G. S. White; statement of W. G. Blake, M. D., taken by agreement, read in evidence; who testified respectively as follows:

166 AFTERNOON SESSION, 1:30 P. M.

Testimony offered by the defense.

ISAAC SHADE, having been duly sworn upon behalf of the defendants, was examined by Mr. J. Warren Reed, and testified as follows, to wit:

Question. What is your name?

Answer. Isaac Shade.

Q. Where do you live?

A. I live near Tahlequah.

Q. Do you remember the time when it was said there that Mr. Wilson was killed out there in that country?

A. Yes, sir.
Q. Where did you live then?
A. I was living near Tahelquah.
Q. The same place you do now?
A. Yes, sir.
Q. What course from Tahlequah?
A. West.
Q. Right west.
A. Yes, sir.
Q. How many miles?
A. Five miles.
Q. Five miles from the town?
A. Yes, sir.
Q. Are you on a public road?
A. Yes, sir; I live right on a public road.
Q. Do you know John Johnson, that lives up there?
A. Yes, sir.
Q. How far did he live from Tahlequah?
A. About 10 miles, I guess, if I am not mistaken; it might be a little further.
Q. What direction is he from Tahlequah?
A. About southwest.
Q. He is right on out in the same direction, except to one side a little of where you live?
A. Yes, sir.
Q. What relation are you to Tom Shade, the defendant?
167 A. He is my nephew.
Q. I will now ask you now, with reference to the time that the man Wilson is said to be killed up there, if you saw Tom Shade?
A. Yes, sir.
Q. You know where he was?
A. Yes, sir.
Q. Did he come to your place, and if so, state about it.
A. He come to my house.
Q. What time did he get there?
A. He come there Monday night.
Q. Who come with him?
A. A boy named John Rat.
Q. Who else?
A. And his wife.
Q. John Rat and his wife?
A. Yes, sir.
Q. How was he travelling—that is, if he was on foot, or horseback, or how?
A. John's wife was on a pony and the other two were on foot.
Q. What night of the week was that?
A. Monday night.
Q. Where did he stay that night?
A. He staid at my house.
Q. Where did he come from; do you know?
A. Not that day.

Q. Do you know where he said he come from?
A. From John's.
The COURT. He can not state what he said about it.
Mr. REED (of counsel for defense). Where did his father live from there?
A. He lived east of where I lived.
Q. How far?
A. That is, he lived on the Tahlequah road, about 6 miles from Tahlequah—east *if* Tahlequah.
Q. So that would put his father 6 miles beyond Tahlequah from you, east of Tahlequah, and you lived five miles west of Tahlequah?
A. Yes, sir.
Q. How long did Tom stay there?
168 A. He staid there all night, and the next morning I got up my team and took my family down to town; they all went together to the town of Tahlequah together.
Q. How did Tom go?
A. He went horseback.
Q. Did his wife go?
A. She went; she came in my wagon and went.
Q. You all went to Tahlequah?
A. Yes, sir.
Q. That was Tuesday, was it?
A. Yes, sir.
Q. State how long you staid there?
A. We staid there all day at Tahlequah, and late in the evening his pony was hitched there where he left me, and I started back home.
Q. How did you start?
A. I started in a wagon.
Q. Who was with you?
A. Me and my wife.
Q. You and your family?
A. Yes, sir.
Q. You left his pony hitched there?
A. Yes, sir; late in the evening.
Q. In the evening when you started out?
A. Ye', sir.
Q. Do you know what became of Tom and his wife that day—that is, if you know of your own knowledge?
A. No, sir; I do not.
Q. When did you next see Tom?
A. The next day.
Q. What time of day?
A. It was tolerable soon; he was going back to Tahlequah.
Q. Tolerable soon in the morning?
A. Yes, sir.
Q. On Wednesday morning?
A. Yes, sir.
Q. What direction did he come?
A. West.
Q. Where did you see him?

A. At my house.
Q. What direction did he come from?
A. West from my house.
Q. Would that be coming from the direction of John Johnson's?
A. Yes, sir.
Q. Is John any relation of his?
169 A. Yes, sir; he is related to him.
Q. He is akin to him?
A. No, sir; he is only by marriage.
Q. How is it?
A. Tom's wife and John's wife are sisters.
Q. Did he come from that direction Wednesday morning?
A. Yes, sir.
Q. Did you tell me how far John Johnson lives from your house?
A. Yes, sir.
Q. Five miles, I think you said?
A. About 5 miles, or 6.
Q. He came from that direction on Wednesday?
A. Yes, sir; Wednesday morning.
Q. Came to your house?
A. Yes, sir.
Q. What did he do then; where did he go?
A. He went to Tahlequah a little before I did.
Q. Did he start in the direction of Tahlequah?
A. Yes, sir.
Q. Where did he say he was going when he started?
A. He started to Tahlequah.
Q. Did you see him any more that day, Wednesday?
A. Yes, sir; I seen him again.
Q. Where did you see him?
A. I seen him at Tahlequah.
Q. Did you see him when you got there?
A. Yes, sir.
Q. How did you go that day?
A. I went there horseback.
Q. How long did you stay there?
A. I didn't stay there very long.
Q. What time did you leave Tahlequah when you started home?
A. Just about a little after three, or about three.
Q. In the afternoon?
A. Yes, sir.
Q. Who come hom' with you?
A. Tome Shade.
Q. He come home with you from Tahlequah?
A. Yes, sir.
Q. Came to your house on Wednesday?
A. Yes, sir.
170 Q. You started, you say, from Tahlequah you think something about 3:00 o'clock; what time would you get home?
A. About 4 o'clock or a little after four.
Q. What did Tom Shade do then; where did he go?

A. He went off.
Q. Which direction?
A. West.
Q. Where did he say he was going?
A. To John Johnson's.
Q. His brother-in-law's?
A. Yes, sir.
Q. Do you know if his wife was at John's?
A. No, sir; I do not know.
Q. You don't know yourself?
A. No, sir.
Q. Did Tom have any guns of any kind with him?
A. No, sir.
Q. Arms, pistols, or anything of that kind?
A. No, sir; not that I know of.

Cross-examination by the DISTRICT ATTORNEY:

Q. You seem to have gone to Tahlequah pretty often; you went there pretty near every day?
A. Yes, sir; I have been there pretty near every day, sometimes.
Q. What for?
A. I just go there.
Q. What for?
A. I went to the mill the first time.
Q. The next time?
A. I don't remember what I went for.
Q. You seem to have gone three or four different days right along there about the time that the man was killed?
A. No, sir; I never was there but twice.
Q. What days were they?
A. Tuesday and Wednesday.
Q. On Wednesday?
A. Yes, sir.
171 Q. He didn't stay at your house Wednesday night, Tom didn't?
A. No, sir; he didn't stay there Wednesday night.
Q. He went back with you and you got home about 4:00 o'clock, and then he went right back again, right towards Tahlequah?
A. No, sir; towards Johnson's.
Q. Johnson's is west from you, is it?
A. Yes, sir.
Q. How far does Johnson live from Big Aleck?
A. I could not tell you; somewhere along about 8 or 9 miles; I could not say, but then it is somewheres along there.
Q. How far do you live from Big Aleck?
A. I live about 12 miles or further.
Q. Then you live about 20 miles from Big Aleck's?
A. No, sir; it is about 12 miles to Big Alekc's. It might be further, I could not say.
Q. Did you see anything of Hickory?
A. No, sir.
Q. You didn't see him?

A. No, sir.
Q. You are no relation of his, are you?
A. Yes, sir.
Q. What kin are you to Hickory?
A. He is my nephew.
Q. Hickory is your nephew, too?
A. Yes, sir.
Q. What relation is Tom Shade to Hickory?
A. Cousins.
Q. First cousins, are they?
A. Yes, sir.
Q. It was on Tuesday that Tom brought his wife to your house, was it, or was it Monday?
A. Monday.
Q. Then Tuesday you went to town?
A. Yes, sir.
Q. Did Tom come back that night?
A. Yes, sir.
Q. Did he stay all night?
A. No, sir.
Q. Where did he go?
A. To John Johnson's.
Q. Took his wife to John Johnson's with him?
172 A. I guess so; I didn't see him in the evening.
Q. He didn't stay at your house any night, then?
A. Only Monday night; no, sir.
Q. What was he doing going backwards and forwards so much?
A. He wasn't doing anything; he was just going to town.
Q. He came over to your house Monday, and staid all night Monday night, and the next day he took his wife to Johnson's; what time did he take his wife to Johnson's Tuesday?
A. He must have took her back Tuesday evening.
Q. What time Tuesday evening?
A. I could not say; I didn't see them in the evening. I left Tom there in town in Tahlequah when I started back home.
Q. On Tuesday?
A. Yes, sir.
Q. You left him in town?
A. Yes, sir; I left him in town.
Q. So you don't know anything about what he did the balance of the time?
A. He was there in town.
Q. What time on Tuesday evening did you see him in town?
A. I could not say the time; it was late in the evening.
Q. What time?
A. It was a little before sundown.
Q. How far did you live from town?
A. About 5 miles.
Q. What time did you get home Tuesday?
A. A little after sundown.
Q. And you left them in town?
A. Yes, sir.

Q. So you don't know what became of them?
A. No, sir; not that night.
Q. Then the next day you saw him and his wife again, Wednesday?
A. No, sir.
Q. You just saw him?
A. I saw him by himself.
Q. Where did you see him?
A. He came to my house.
173 Q. What did he come to your house for? He had been there the day before.
A. That is the way he always goes.
Q. Didn't live with you, did he?
A. No, sir; he didn't live with me.
Q. What was he over there for at your house on Wednesday; what was he there for?
A. Going to town.
Q. Would he pass your house to go to town from Johnson's?
A. Yes, sir.
Q. And then if you left him in town on Tuesday night he went to Johnson's and went right by your house in going there?
A. There is another road besides the road that goes by my house.
Q. What time on Wednesday did you see him going to town in the morning?
A. It was mighty near 11 o'clock, I guess; it was tolerable late.
Q. Did you see anything more of him that day?
A. Yes, sir.
Q. What did you go to town for that day?
A. I don't remember what I went for.
Q. Try and remember what you went for?
A. I don't remember why I went.
Q. Do you know Joe Shade?
A. Yes, sir.
Q. What relation is he of yours?
A. He is my brother.
Q. He is the father of the defendant?
A. Yes, sir.

Redirect examination by Mr. THOS. M. BARNES:

This time that you have been asked about is with reference to the time that this marshal was said to have been killed up there at Big
174 Aleck's; now, the Monday night that he came to your house that was the Monday night before the time that he was said to have been shot over there?
A. Yes, sir.
Q. That is the time you are talking about?
A. Yes, sir.

175 PEGGY SHADE, having been duly sworn upon behalf of the defense, was examined by Mr. J. Warren Reed through Interpreter Walkingstick, and testified as follows, to wit:

Question. Ask her her name?
Answer. Peggy, she says.

Q. What is her husband's name?
A. It is Shade.
Q. What relation is she to Tom Shade here?
Not any relation at all.
Q. What akin, if she is akin by marriage or how?
A. It is her husband's son.
Q. She is his stepmother?
A. Yes, sir.
Q. Where dies she live with reference to Tahlequah up there?
A. Seven miles east of Tahlequah.
Q. Ask her if she heard about a marshal up there, a man named Wilson, being killed last year?
A. Yes, sir; she heard about it.
Q. Ask her if she was in the town of Tahlequah about that time?
A. Yes, sir; she was in the town of Tahlequah.
Q. What day of the week was she there?
A. On Tuesday.
Q. How did she go there?
A. She went horseback.
Q. What did she go for?
A. She went after some soffee.
Q. Did she take anything with her?
A. She took some sweet potatoes with her.
Q. Ask her if she saw Tom Shade that day?
A. Yes, sir.
Q. Where was he and what was he doing?
A. He wasn't doing anything; she saw him near Jim Stapler's store.
176 Q. Did she see his wife that day?
A. Yes, sir.
Q. Was his wife with him?
A. Yes, sir.
Q. What time of day was it that she saw him there?
A. She says she got there about 10:00 o'clock in the morning, forenoon.
Q. What time did she see Tom Shade?
A. She says she saw him just as soon as she got to town.
Q. When was the last she saw him? What time of day would be the last time she saw him?
A. She says she guesses it must have been something about three o'clock in the evening when she last saw him.
Q. Where was he when she last saw him in the evening?
A. In town.
Q. Town of Tahlequah?
A. Yes, sir.
Q. That was on Tuesday, does she say now, the day the man is said to have been killed?
A. Yes, sir.
Q. How long before that had she seen him last?
A. He had left her house the Saturday before.
Q. Does she know where he went to?
A. She says that he said he was going to—I can't interpret the name.

Q. Who left with him; how did he go?
A. His wife and another man.
Q. How did they go?
A. They walked.
Q. How did his wife go?
A. She was riding.
Q. His wife rode and the two men they walked?
A. Yes, sir.
Q. What was the wife riding?
A. Riding a horse.
Q. Who was the man with them?
A. I can't interpret it——
The DISTRICT ATTORNEY. John Rat?
A. Yes, sir; that is it.

177 Cross-examination by the DISTRICT ATTORNEY:

Q. Did she see anything more of Tom after that?
A. She says she saw him when he came back to her house.
Q. When was that?
A. It was on Saturday.
Q. The next Saturday?
A. Yes, sir.
Q. On Saturday following that Tuesday she saw him at Tahlequah?
A. Yes, sir.
Q. Did his wife come back with him?
A. Yes, sir.
Q. Did Mr. Rat come along?
A. He didn't come back until the next day.
Q. Mr. Rat didn't come until Sunday?
A. No, sir.
Q. Where did Tom live?
A. He lived at her house?
Q. Tom lived with her, did he?
A. Yes, sir.
Q. He staid there?
A. Sometimes they would be there over at his wife's sisters.
Q. If Tom lived with her and was away from home all that week, from Tuesday until Saturday, he was away from home all that week, was he not?
A. Yes, sir.
Q. What did Tom do with his gun; did he take it with him or leave it at home?
A. He didn't have any gun.
Q. Didn't have a Winchester?
A. No, sir.
Q. Didn't have one when he came back on Saturday?
A. No, sir; he didn't have any.
Q. Has Hickory got a gun?
A. She says she reckons not.
Q. Does she know?
A. She goes on to say when he came back he didn't have any gun.

178 Q. Who didn't?
A. Sam.

Q. Did he have one when he went 'way; when he came back from where?

A. It is Tom, I should have said.

Q. Don't she know that Sam had a gun all the time that he was on the scout?

A. No, sir.

Q. She don't know that Sam Hickory had a gun?

A. No, sir; she don't know anything about it.

Q. She saw Hickory while she was there when he was on the scout?

A. No, sir.

Q. Didn't come to her house?

A. No, sir.

Q. Did she ever see Hickory after that killing until she saw him here?

A. No, sir; she didn't see him any more until she saw him here.

Q. She never saw him any more after that killing until she saw him here?

A. No, sir.

Q. She is Hickory's aunt by marriage?

A. Her husband is an uncle to Hickory; yes, sir.

Q. And her husband is Shade's father?

A. Yes, sir.

179 JOHN JOHNSON, having been duly sworn upon behalf of the defense, was examined through Interpreter Walkingstick by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Ask him his name?

Answer. John Johnson.

Q. Ask him whereabouts he lives?

A. At Tahlequah district.

Q. How far from Tahlequah; does he know?

A. About 10 miles.

Q. What course from Tahlequah?

A. West.

Q. Ten miles west?

A. Yes, sir.

Q. Ask him what relation he is to Tom Shade here, if any?

A. He is not any relation.

Q. Ask him if he understand' what that is? Ask him if he is any akin to him? Is he any marriage akin to him in anyway?

A. No, sir; he is not related to him anyway.

Q. Ask him what relation Tom's wife is and his wife; what akin are they?

A. They are sisters.

Q. Ask him if he remembers when it was said that a marshal by the name of Wilson was killed up there near Tahlequah?

A. Yes, sir.

Q. Did he hear of it?

A. Yes, sir.

Q. What day did he hear it on?

A. On Thursday.

Q. He learned it on Thursday?

A. Yes, sir.

Q. When did he learn it had occurred?

A. He says he don't know exactly when it was done.

Q. If he knows the day whether he knew the hour or not? When did he learn the day it was done on; what day of the week was it done on?

A. He says it was either Tuesday or Wednesday.

Q. Ask him if Tom Shade came to his house about that time?

180 A. Yes, sir; he came to my house on Tuesday night, he says.

Q. Ask him if that was in the same week that he heard that the man was killed?

A. Yes, sir.

Q. How did he come to his house, in a wagon; did he ride or walk, or how did he come?

A. He was riding.

Q. Who was with him?

A. His wife.

Q. His wife was with him when he came on Tuesday night. What time in the evening did he come there?

A. It was after night sometime; after dark.

Q. A little after dark?

A. Yes, sir.

Q. Did they have one horse between them, or two?

A. Just one.

Q. What direction did they come from on Tuesday when they come to his house; what direction did they come from?

A. From the direction of Tahlequah.

Q. Did they stay all night Tuesday night at his house?

A. No, sir; only his wife staid all night.

Q. Does he understand the question; that night when they came from Tahlequah on Tuesday, if they staid all night there?

A. Yes, sir; he understands you. He says it was his wife staid.

The DISTRICT ATTORNEY. Tom didn't stay?

Answer. No, sir.

Mr. REED (of counsel for defense). Did he see Tom in the morning? Ask him where Tom staid Tuesday night. I don't think he understands me.

A. He don't know where he staid.

Q. Ask him if he has not told me all the time that Tom staid at his house Tuesday night, and if he is not mistaken about it; that he came there with his wife from Tahlequah?

A. No, sir; he says that he told you through an interpreter that

181 he never staid all night there at all.

Q. Did he see him in the morning?

A. No, sir.

Q. Does he know where he went the next day?

A. No, sir.

Q. Did he see him the next evening?

A. No, sir.

Q. When did he see him again?

A. Friday night.

Q. Ask him if he is not mistaken; if he has not told me that Tom staid at his house on Tuesday night and Wednesday night both; staid Tuesday night and went off Wednesday morning to Tahlequah, and returned Wednesday evening to his house from Tahlequah?

A. No, sir; he says he never told you that; it was a mistake of the interpreter.

Q. Was his wife there—Tom Shade's wife?

A. Yes, sir; she was there.

Q. Come there on Tuesday night?

A. Yes, sir.

Q. Did she stay there?

A. Yes, sir.

Q. Ask him to think about that?

A. He says that is the best he can do.

Q. His recollection now is that he seen him at the next time when?

A. Friday night.

Q. Did he stay that night there?

A. No; when he come there that night he just come there and took his wife.

Q. Friday night?

A. Yes, sir.

Q. What time?

A. It was right away after dark.

Q. Which way did he go from there?

A. He said he was going to his father's.

Q. Did he go in that direction?

A. Yes, sir.

Q. That is the last he saw of him, is it?

A. Yes, sir.

182 Q. Ask him how often I have talked to him through an interpreter; through Isaac Shade, the interpreter.

A. He says about three times.

Q. Ask him if Isaac is not a good interpreter.

A. No, sir; he says he don't know; he don't understand English.

Q. Ask him if he did not tell me through the interpreter, Isaac Shade, that Tom Shade staid there at his house Tuesday night, Wednesday night, and Thursday night of that week—the week that the man was killed.

A. No, sir; he said that Isaac Shade said he staid all night these three nights at his house, but he said not.

Q. Ask him if he didn't tell me through an interpreter each time——

The DISTRICT ATTORNEY. Let's understand how that was; that Isaac Shade told him to say that?

A. No, sir; but he said that Isaac Shade told him if he staid there these nights, and he says to his recollection he didn't stay there during these times.

Mr. REED (of counsel for defense). He said that Isaac asked him?

A. No, sir; he says he told him that.

Q. That if he didn't?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

He says that Tom Shade came to his house on Tuesday evening?

A. Yes, sir.

Q. Left his wife there, and went off?

A. Yes, sir.

Q. And didn't come back again until Friday night?

A. Yes, sir.
Q. And then took his wife away?
A. Yes, sir.
Q. On Thursday he learned of the killing?
A. Yes, sir.
Q. Ask him if Hickory wasn't with Tom Shade when he came back there Friday night?
A. No, sir.
183 Q. Did he see anything of Hickory that week?
A. No, sir; he did not see him.
Q. How far does he live from Big Aleck's?
A. About 8 miles.
Q. Did he go over to Big Aleck's after this killing; did he go over there Thursday?
A. No, sir.
Q. Where did Tom Shade live?
A. He says he used to stay at his house there before that time.
Q. Before that time he staid at his house?
A. Yes, sir.
Q. Was he living at his house up to that time?
A. No, sir.
Q. I want to know where he was living at that time?
A. He was staying with his father.
Q. Ask him if he knew where Tom was going on Tuesday night when he left his wife at his house and went off?
A. He did not.
Q. Did Tom tell him where he was going?
A. No, sir.
Q. Didn't Tom tell his wife where he was going?
A. No, sir; he never asked him anything about it.
Q. What time did he leave on Tuesday night?
A. It was right away after dark he says; it was just getting dark.
Q. How did he go?
A. He rode.
Q. Why didn't he go with him?
A. He says he didn't want to go anywhere.
Q. Did Tom have a gun?
A. No, sir.
Q. Did he have a gun when he came back Friday night?
A. He did not see any.
Q. Does he know whether Tom wore the same coat on Friday when he came back as he did when he went away?
A. He says he don't know as to that.
Q. What is the reason he does not know?
A. It was in the night when it was there.
184 Q. Press him a little on that, and ask him the reason he does not know.
A. He says he don't know.
Q. Ask him if Tom had the same saddle?
A. Yes, sir; he said he had the same saddle.

Q. Ask him if he does not know that Tom took that murdered man's saddle and gave it to a man named Triplett?

A. No, sir.

Q. Did he never see the saddle and bridle?

A. No, sir; he never saw it.

Q. Did Tom have a pistol afterwards?

A. No, sir.

Q. Did Tom stay at his house any more after that Friday night?

A. No, sir.

Q. Never staid there any more; did he get supper there at his house on Friday night?

A. Yes, sir; he got supper there.

Q. Tell him if he got supper there he ought to be able to tell about his coat.

A. He says he didn't pay any attention to that; he don't know anything about this other matter.

Q. Did he ask Tom where he had been?

A. No; he never asked him.

Q. Didn't ask him where he had been during that week that the man was killed?

A. No, sir; he never asked the question.

Redirect examination by Mr. REED (of counsel for defense):

Ask him how late it was that Tom Shade came there that Tuesday night from Tahlequah?

A. He says just good dark, in the early part of the night; not very late.

Q. Ask him if he got his supper after he come—him and his wife?

A. Yes, sir.

185 ARCH DOWNING, having been duly sworn upon behalf of the defense, was examined through Interpreter Walkingstick, by Mr. J. Warren Read, and testified as follows, to wit:

Question. Ask him where he lives.

Answer. Tahlequah district.

Q. What position does he hold up there? Has he got any office?

A. No, sir; he does not hold any office.

Q. Has he heretofore?

A. He was a deputy high sheriff there awhile.

Q. Did he ever know Tom Shade there?

A. Yes, sir.

Q. Ask him if he knows the time that it was said that a man named Wilson was killed up there, a marshal.

A. Yes, sir; he heard about it.

Q. When did he learn it?

A. About sundown on the second day after he was killed.

Q. Sundown of the second day afterwards?

A. Yes, sir.

Q. What day of the week was it that he learned it?

A. It was on Thursday.

Q. What day did he learn it had been done?

A. Tuesday.

Q. That was what day of the month, and what month, if he knows?

A. He says it was in September.

Q. Does he know the day of the month?

A. The 22nd.

Q. It occurred on Tuesday the 22nd?

A. Yes, sir.

Q. Ask him if he knows Tom Shade here.

A. Yes, sir.

Q. Ask him if he saw Tom Shade about that time, with reference to that time.

A. Yes, sir; he saw him late Tuesday evening.

Q. Where did he see him at?

A. He was standing at the door of the post-office.

186 Q. Saw him late Tuesday evening in the town of Tahlequah?

A. Yes, sir.

Q. Where did he live at that time?

A. He lived at the national jail.

Q. He was an officer there, was he?

A. Yes, sir.

Q. What place in Tahlequah did he see him?

A. At the post-office.

Q. Who keeps the post-office?

A. Jim Stapler.

Q. Tell him he has said he seen him late Tuesday evening; ask him if he can fix the time, with reference to the sun. That is, whether it was sundown or near sundown, or how.

A. He says about half after four in the evening.

Cross-examination by the DISTRICT ATTORNEY:

Q. Ask him if he is any relation to Hickory.

A. No, sir.

Q. He does not belong to the same Downing family?

A. No, sir.

Q. Ask him if he saw Hickory about that time, too?

A. No, sir; he didn't see him.

Q. He was an officer; when he learned about this killing did he go out and help hunt the man?

A. No, sir.

Q. Was this gentleman setting here the sheriff at that time [referring to Mr. Clarke]?

A. No, sir; Starr.

Q. Starr was the high sheriff?

A. Yes, sir.

Q. He was guarding prisoners for Starr, was he?

A. Yes, sir.

Q. The place that he was holding was the office of guarding

187 prisoners?

A. Yes, sir.

Q. That is all he knows about it, is it?

A. Yes, sir.

Q. Did he tell Cornelius Boudinot on Tuesday or Wednesday about this matter?

A. No, sir.

Q. He didn't tell him on Wednesday about the killing of a deputy marshal?

A. No, sir; he says that he didn't go nowhere on that day.

Q. From whom did he get his information?

A. He says Mr. Clarke's deputy told him; the man that was acting as deputy under him.

Q. What time was it that he got the information?

A. It was Wednesday evening late.

188 BRYANT HUGHES, having been recalled upon behalf of the defense, was examined by Mr. J. Warren Reed, and testified as follows, to-wit:

Question. Your name is Bryant Hughes?

Answer. Yes, sir.

Q. You have been here sometime as a witness?

A. I have been here 22 days.

Q. Do you remember making a statement about your testimony in this case to Mr. Downing, Arch Downing?

A. No, sir.

Q. Down there at the City Hotel, since you have been here?

A. I don't recollect of making any statement to him.

Q. Don't you remember of talking to him down there?

A. No, sir.

Q. Did you tell him there that you didn't know anything about this case?

A. That is outside; I wasn't in court; of course, that was outside.

Q. You say that was outside?

A. Yes, sir; they had been bothering me so much.

Q. Did you state to him you didn't know anything about the case?

A. I don't believe I did; I don't recollect of telling hom that.

Q. Did you tell him that the Careys had been wanting you to testify to something in this case against the defendants, but you didn't know anything, and that you had never seen Sam Hickory after this killing occur'ed?

A. It was this way; they bothered me so much I didn't want to tell them.

Q. Did you tell Arch Downing that?

A. No, sir; I didn't tell Arch Downing anything about it.

189 Q. Do you remember of having a conversation down here about the case by the court-house wall down here with Tom Keener, and Isaac Shade was setting there one day?

A. They took me over there to talk to me to try to get me—Joe Shade offered me—

Q. Do you remember when you were setting down by the court-house walk, when you were setting down by the walk that you told them in the presence of several people that you didn't know anything about this case, that the Careys had been wanting you to testify against these defendants, but you didn't recollect of having seen them; you had never seen Sam Hickory after this killing occurred. Did you tell them that?

A. I told them—of course I wanted them to quit bothering me; I didn't want them to bother me all the time.

Q. You told it, did you?

A. If I know anything of course I didn't wan't to tell anybody; that is what I told them. I told them I would tell it in court.

Q. Are you friendly or unfriendly with these defendants?

A. I haven't got anything against them.

Q. Tom Shade helped arrest you, didn't he?

A. He arrested me, but I didn't have anything against him.

Q. Did he not arrest you a year or two ago?

A. It was a marshal arrested me.

Q. Wasn't he with the marshal that arrested you; was he not a posse for the marshal?

A. I don't know whether he was a posse or not.

Q. He was with him?

A. Yes, sir; he was along with him.

Q. He was a witness against you, was he not?

190 A. I don't know where he was or not.

Q. You were brought here to this court were you not, on a charge at that time?

A. Yes, sir.

Q. How often have you been brought here on charges?

A. Twice.

Q. You fell out with him after that, didn't you?

A. No, sir.

Q. You had a fight didn't you?

A. I kept a fuss down; him an' Aaron Carey was fighting.

Q. Didn't you have a fight with him?

A. No, sir; I didn't have no fight with him; another fellow took it up again, and him and another fellow had a fight.

Q. Didn't you have a hand in it?

A. Yes, sir; of course I tried to keep them from fighting.

Q. You say him and Aaron Carey had a fight?

A. Yes, sir.

Q. Was not you mixed in the fight?

A. I of course was there trying to keep the fuss down; I didn't want to have any fight.

Q. Did you get mad at him about a girl?

A. About whose girl?

Q. Didn't you get mad at him about your neice?

A. No, sir; I didn't have anything to do with her at all. I wasn't at home at that time that he took that girl. I didn't have anything to do with it.

Q. That is the reason you got mad, is it not, because you were not there?

A. No, sir; I wasn't mad about it; I didn't care what they done.

Q. You didn't get mad?

A. I didn't have anything to do wit' it; I would have went right to the house and took the girl away from him, but I didn't have anything to do with it.

Q. You were present when him and Aaron Carey had the fight?

191 A. Yes, sir.

Q. How many were there?

A. I could not tell you; there was a go' many; there was lots of people there.

Q. Where was the fight there at?

A. Right close to the convention grounds.

Q. What was going on?

A. They had a convention there, and it all broke up, and they were al' going home.

Q. Answer me if it is not a fact that you are unfriendly to Tom Shade?

A. I haven't got anything against him at all.

Redirect examination by the DISTRICT ATTORNEY:

Q. They have asked you if you told Tom Keener and Isaac Shade certain things here. I will ask you if Tom Keener did not try to get you to swear on the other side of the case?

A. Yes, sir; he wanted me to swear in another way; tried to scare me out of here; threatened my life at one time.

What did he say?

A. He said if I went back home I wouldn't live long; I wouldn't see peace anyhow, if I testified in this case against him, if it went against him.

Q. Did Isaac Shade say anything to you about it?

A. No, sir.

Q. Did Joe Shade?

A. Yes, sir.

Q. The father?

A. He took me out to one side——

Q. Was he with Keener at the time?

A. No, sir.

Q. Then I will not ask you about that now. Keener told you if you swore here and this case went against these defendants that your life would be in danger if you went back home?

A. Yes, sir.

192 Q. That if you wanted peace you had better do what?

A. If I wanted peace to swear on his side, and I would go back home all right.

Q. That is what he told you?

A. Yes, *d*ir.

Q. That is Tom Keener?

A. Yes, sir.

Recross-examination by Mr. J. WARREN REED:

You say that Isaac Shade didn't say anything to you?

A. No, *d*ir.

Q. Didn't Tom Keener say this to you; didn't he say to you that he learned that you were going to swear so and so, and that he had learned you were going to swear to a li*t* against these boys, and told you not to swear a lie against anybody?

A. No, sir.

Q. That is the way that he said it to you, is it not; that he heard that you were going to swear to a lie?

A. No, sir.

Q. Didn't he say that, and didn't you say you didn't know anything in the world to swear, and these Careys are trying to get me to swear, but I don't know nothing; I never did see Sam Hickory after the shooting; wasn't that the way it was?

A. No, sir.

Re-direct examination by the DISTRICT ATTORNEY:

You may state what Joe Shade said to you.

A. He is the one that offered me the horse to swear another way, on his side.

Q. To swear to what?

193 A. To swear for him; not swear on the side of the Government?

Q. What did he want you to swear to?

A. Wanted me to swear to lie; wanted me to keep it secret.

Q. Wanted you to keep back what you knew?

A. Yes, sir.

Re-cross examination by Mr. J. WARREN REED:

When was that?

A. I could not tell you; it has been two or three days ago, the first time we come down here.

Q. Where was it at?

A. Right out here close to a saloon.

Q. Didn't tell you anything he wanted you to swear at all?

A. He told me to swear———

Q. Just to swear on his side?

A. Yes, sir.

Q. Didn't tell you anything to swear?

A. Told me not to swear what I knew; to keep what I knew secret.

194 AARON CAREY, having been duly recal'ed upon behalf of the defense, was examined by Mr. J. Warren Reed, and testified as follows, to wit:

Question. You are not friendly to Tom Shade, are you?

The DISTRICT ATTORNEY. He has not testified a word against Tom Shade; he has testified against the other man.

Mr. REED (of counsel for defense). We will show it comes around in a different way.

The DISTRICT ATTORNEY. I would like to know what different way it came *come* around in.

Mr. REED (of counsel for defense). You were a witness here against him in a case once before, were you not—in a whiskey case?

A. Yes, sir.

Q. You are a witness against him in a whiskey case now, are you not, in this court?

A. Yes, sir.

Q. How long ago has it been since you were a witness in the whiskey case against him before?

A. It has been about a year, I guess.

Q. Who else were witness with you on the *the* whiskey case?

John Hair.

Q. You and John Hair?

A. Yes, sir; and Charley Stephens.

The DISTRICT ATTORNEY. That has already been proven; the very subpœna has John Hair's name on it, and his name, and I have read that to the jury.

Mr. REED (of counsel for defense). Do you know Dave Tucker?

A. Yes, sir; I know him.

195 Q. Tom, here, was a witness against Dave Tucker, wasn't he, in a whiskey case?

A. I suppose so; I don't know.

Q. But you were a witness against Tom?

The DISTRICT ATTORNEY. I can not understand what he is going into these whiskey cases for. Certainly, Dave Tucker hasn't anything to do with this case. I don't know what the gentleman is trying to get at, but something ought to appear, it seems to me.

Mr. REED (of counsel for defense). We went to show that this man Tucker is related to these Careys, or running with them; they are all friends; that Shade was a witness against Tucker; and then that these Careys made some threats against Shade, and then appeared as witnesses against Shade, and have been constant witnesses against him in two cases, one right after the other; and if we can show that Carey had been getting this other man to testify in the case I think it is proper to show his feeling.

The COURT. It is too remote, unless you can show his feeling against the defendant.

Mr. REED (of counsel for defense). Is Tucker related to you? What kin is he to you?

A. I don't know; he is a little akin to me, but I don't know what akin he is?

Q. Didn't you get mad at Tom Shade, here, because he was a witness against Tucker, and then report him?

A. No, sir.

Q. And turn up a witness against him?

A. No, sir; I never got mad.

Q. You didn't get mad?

A. No, sir.

Q. And after Tucker was arrested for whiskey, then you had Tom Shade arrested; isn't that true?

A. Yes, sir; it was a little while after.

196 Q. One was a little while after the other?

A. Yes, sir.

Q. Is it not a fact that Shade was a witness against Hughes in a liquor case, and that you turned around and reported him in a liquor case, and had him brought here?

The COURT. He has not said he reported him at all; he said he was a witness.

Mr. REED (of counsel for defense). Didn't you report Tom Shade?

A. Yes, sir.

197 ARCH DOWNING, having been recalled upon behalf of the defense, was examined by Mr. J. Warren Reed, and testified as follows, to wit: (Through Interpreter Walkingstick.)

Question. Ask him if he knows Bryant Hughes, a witness here.

Answer. Yes, sir.

Q. Ask him if he has had any talk with him at the City Hotel since he has been here about this case.

A. Yes, sir.

Q. Ask him if he said anything to him.

A. Yes, sir; he said he just volunteered and told him; he never asked him, and he never said nothing to him.

Q. Volunteered a'd told him what?

A. A. "I am here and I don't know anything."

Q. Was he talking about this case?

A. Yes, sir; about this case.

Q. What else did he say?

A. He said "There is some one training me about to what to say."

Q. Instructing him? He said that somebody was instructing him what to say.

A. Yes, sir.

Q. Did he say who it was that was instructing him?

A. He did not say who it was.

Q. Ask him if he said anything about the Careys?

A. That is all that he told him. He never said anything about them.

Q. Ask him if he said anything about seeing Sam Downing, whether he had seen Sam Hickory here after that man was killed.

A. He said that he had never seen them.

Q. Had never seen them when?

A. Had never se'n them after the killing.

Q. That he had never seen him after the killing?

198 A. Yes, sir; had never seen them.

Q. When he says "them," who does he mean; who does he have reference to?

A. To Sam Hickory and this other man.

Q. Tom Shade?

A. Yes, sir.

Recross-examination by the DISTRICT ATTORNEY:

Q. He is one of these kind of witnesses that are brought here and never know anything until after he comes here; makes himself a witness after he comes here. Ask him if he is that kind of a witness; that he makes himself a witness after he comes here. Does he know anything then about the case?

A. He says whenever he comes here he tells just what he knows.

Q. He didn't know anything when he come, but has testified to what he learned after he came here?

A. He says he t'lls what he always knew.

Q. He always knew it, did he? He knew this was going to be told to him before he came here, did he?

A. No, sir.

Q. Then what did he come for?

A. He said he had been subpœnaed, is the reason he came.

Q. What did he know; did he know anything until he came here, and then learned it after he got here; earned his money after he got here?

A. He said he had seen this man.

Q. Saw him on Tuesday when nobody claimed that he was anywhere?

Mr. BARNES (of counsel for defense). That is a question for argument.

The DISTRICT ATTORNEY. Ask him 'hat he said this for: That Hughes said to him "I am here and I don't know anything; he
199 said somebody was training him; didn' say anything about Carey, and this is all that was said," and then afterwards go on and tell more that he said. Ask him what he swore to that for? If he swore that was all that he told him what he went on for and told other things that he told him, if that was all that he told him?

A. He says that he was just telling that.

Q. Ask him who else heard it besides him?

A. There were two men standing right by.

Q. Who are they?

A. Dave Downing and Lewis Henry's son.

Q. Is he here?

A. He says he don't know where they are.

Q. Are they in town?

A. Yes, sir; they are both in town.

Q. Witnesses here?

A. No, sir.

Q. Dave Downing is Hickory's brother, is he not?

A. No, sir.

Q. Any relation to him?

A. No, sir.

Q. What is Dave doing here?

A. He is a witness in another case.

Q. What is Lewiss Henry's son doing here?

A. He is a witness also in another case.

Q. They are Cherokees, are they?

A. Yes, sir.

Redirect examination by Mr. THOS. H. BARNES:

Ask him if he knows whether these two men heard all this fellow said to him or not?

A. Yes, sir.

200 THOMAS KEENER, having been duly sworn upon behalf of the defendant, was examined, through an interpreter, by Mr. J. Warren Reed, through an interpreter, and testified as follows, to wit:

Question. What is his name?

Answer. Tom Keener.

Q. Where does he live?

A. He says he lives in Coo-wee-scoo-wee district.

Q. Ask him if he knows Bryant Hughes?

A. Yes, sir; he says he is acquainted with him.

Q. Ask him if he heard Bryant make any statement since he has been here as a witness at this court, near the court-house here, with reference to what he knew about this case—his testimony in this case?

A. Yes, sir.

Q. Ask him to tell what it was?

A. He says that he told him that he had something to tell him, and he went on to tell him that he was here but, he didn't know anything.

Q. What else did he say?

A. He told him all right; he says he told him that he knew nothing about it then, and then he told him that Aaron was instructing him what to say, what to tell; for both to tell the same thing.

Q. Aaron who?

A. Aaron Carey.

Q. Aaron was instructing him what to say, so they would both tell the same story?

A. Yes, sir.

Q. What else did he say?

A. He says he told him he was afraid to tell anything of that kind.

201 Q. What else?

A. He says he just told him this: That this wasn't any place to tell anything you didn't know, to tell lies; because you took an oath to tell the truth and nothing else.

Q. He told him this wasn't the place to tell anything but the truth?

A. Yes, sir.

Q. Ask him if he said anything about seeing Sam Hickory after this killing?

The DISTRICT ATTORNEY. I would like to have your honor instruct Mr. Reed that in the examination of these post-mortem witnesses he is not to put leading questions.

Mr. BARNES (of counsel for defense). We object to the statement "post-mortem witness." It is not the first witness on either side——

The COURT. You will have to abstain from asking leading questions.

Mr. REED (of counsel for defense). Tell the witness to go on if there was anything else.

A. And then he told him this, asked him if he did see these boys after the killing, and he said, "No; he didn't see them any more afterwards." That is all that he told him.

Q. Ask him if he made any threats against Bryant Hughes, threaten him to kill him if he went back to the country; tell him tha' he would be killed, or anything of the kind?

A. No, sir; he says he come to him himself.

Q. Does he know Jim Squirrel, Jim Skalolol?

A. Yes, sir.

Q. Does he remember the time it is said that *that* Marshal Wilson

202 was killed up there near Tahlequah, at Aleck Stock's; does *he* remember the occurrence?

A. Yes, sir; he said he heard that on the second day after the killing was said to have been done.

Q. Does he know where Jim Squirrel was on that day, on the day the man is said to have been killed?

A. He says that he was at Grand River at a fish killing.

Q. Who was?
A. Jim Squirrel.
Q. Was he there, to'?
A. Yes, sir.
Q. He was at Grand River at a fish killing?
A. Yes, sir.
Q. Ask him what day of the week it was, if he knows?
A. On the 22nd.
Q. What day of the week?
A. On Tuesday.
Q. How many miles from Aleck Stock's was that?
A. About 16 miles.
Q. Was Jim riding or walking when he was up there?
A. He was riding.
Q. Horseback?
A. Yes, sir.
Q. What time of day did he leave to go home that evening?
A. In the afternoon sometime, soon after dinner; somewhere near 3:00 o'clock.
Q. Has he ever been at the place where this shooting was done since it occurred?
A. He says he has been there several times.
Q. Ask him if he has made any examination for shots there at the place, at the house, around there?
A. Yes, sir.
Q. Ask him to describe the bullet holes that he saw there?
A. He says there was a glanced shot on the post—just glanced the post, and then there was a bullet hole on the porch floor.
Q. Where else?
A. And then there was two bullet holes in the door shutter.
203 Q. Did they go in or out?
A. He says they came out; those two in the door shutter.
Q. They came out through the door shutter?
A. Yes, sir.
Q. Tell him to go on and describe all there was there.
A. And then there was another glanced shot in the other door shutter—in the middle door.
Q. The glanced shot in the middle door shutter?
A. Yes, sir.
Q. Where did that go to, if he could tell?
A. He says that shot glanced, just glanced the door shutter and hit the wall in the side room.
Q. What other shots did he see?
A. And then he says there was another bullet hole about that far [indicating about a foot] from the window, the outside of the side room.
Q. Was that going out or in?
A. It went out; come out.
Q. Ask him how many bullet holes were in the porch post.
A. In two posts.
Q. In *tow* posts?
A. Yes, sir.

Q. Ask him how many porch posts there were.
A. He says four.
Q. Where was the holes in the posts?
A. He says there was one in the corner post, on the east corner.
Q. He says it would be on the east corner?
A. Yes, sir.
Q. On the corner towards the east?
A. Yes, sir.
Q. Where was the other one?
A. The post that was even with the door.
Q. Which one, to the right or left of the door, when he said it is even to the door?
A. The right-hand post.
Q. Ask him which one of the middle posts was it that had the bullet hole in it?
204 A. It is the first post from the corner post, he said.
Q. Take the corner post; which way did the hole in the corner post go, in towards the door or out?
A. No, sir; he said the bullet went this direction, towards the door.
Q. Ask him if it would go in t'is way [indicating] towards the door.
A. Yes, sir.
Q. Which way did the bullet hole that went through the other post go?
A. He says the other one came from in the house.
Q. Came from towards the door?
A. Yes, sir.
Q. Then it came out this way [indicating]?
A. Yes, sir.
Q. Tell him he spoke about a bullet hole in the floor; ask him where that was.
A. He says the bullet came from this way, on the outside of the porch, and he says it made a cut in the porch.
Q. Come 'ut this way?
A. No, sir; came out towards the door.
Q. Did it go straight in, or was it slanting?
A. It went in.
Q. Is he speaking of the bullet hole that went in the floor or the wall?
A. On the porch.
Q. Ask him if there was any in the wall about the door.
A. He said there was one where he knew it hit, but it didn't go in the wall.
Q. How close was that to the door?
A. About three feet, he said.
Q. Which way was the ball going; which way had it come from? First ask him which side of the door it was; when he was standing with his face to the door, would it be to his right hand or left?
A. Up on the right hand side.
Q. Which way did that bal' come from that struck the wall near the door?
A. The one that came through the corner post here, he said.

205 Q. Was it the bullet hole that went through the post that struck the wall?

A. Yes, sir.

Q. That is his judgment about that?

A. Yes, sir.

Q. Where is this bullet hole that he saw in the floor; as to the door, whether it was just in front of the door or not?

A. He says on the porch.

Q. Ask him whereabouts on the porch?

A. A little to the right of the door, and close to the door.

Q. How long after the man was killed was it that he was there?

A. He says he does not know exactly, but he says he guesses it was something about a week afterwards.

Q. Did he see any blood there on the floor when he was there?

A. No, sir; he didn't see anything of the kind.

Cross-examination by the DISTRICT ATTORNEY:

Q. *Q.* Ask him what relation he is of Hickory's?

A. He says they are close related.

Q. How close related is he to Hickory?

A. He says that Hickory is his aunt's daughter's son.

Q. Second cousin to Hickory?

A. Yes, sir.

Q. What relation is he to Shade?

A. No kin to Shade.

Q. Just to Hickory?

A. Yes, sir.

Q. When did he have this talk that he had with Hughes, or claims to have had with Hughes?

A. On Wednesday night.

Q. Last Wednesday night?

A. Yes, sir; he guesses that is it.

Q. Does he know when it was? (To the witness.) When was it? You understand English. Was it last Wednesday night? (Witness

206 answers in Indian.)

The INTERPRETER. He says it was on the third of August—Wednesday.

Q. How does he know it was the third of August?

A. He says the' can tell by the almanac.

Q. He looked at the almanac to see what day it was, did he?

A. Yes, sir.

Q. Why did he do that?

A. He says he just wanted to know when this was.

Q. Did anybody tell him to look at the almanac so as to be able to tell what day this was?

A. No, sir.

Q. What was he looking at the almanac for; so he could be able to tell it in court?

A. He says they all use almanacs when they want to know anything.

Q. How come him to look at the almanac that night after he talked with him so as to know it was the third of August?

A. He says he wanted to know when it was.

Q. He has said that he wanted to be able to tell; is that the reason why, so he would be able to testify?

A. No; he said that just because you asked him.

Q. It is not true, then?

A. He says if it is not the third of August it is not true.

Q. He says he told me that because I asked him; he said he looked at the almanac to be able to tell; ask him if he really did look at the almanac after this thing occurred in order to be able to tell, after he had this talk.

A. Yes, sir.

Q. He looked at it in order to be able to tell in court what day it was?

207 A. No, sir; I didn't think anything about that part of it, he says.

Q. What did he look for?

A. He says, "Because I always take notice of such things."

Q. What day of the month is to-day?

A. The 19th.

Q. Of what?

A. August.

Q. This is the 19th of August, is it?

A. Yes, sir.

Q. Ask him if it is not the 19th of September.

A. No, sir.

Q. When did he look at the almanac to find out?

A. He says, "I looked at the almanac awhile ago."

Q. What for? Did he expect to be asked the question what day of the month this was?

A. No, sir; he didn't think so.

Q. What did he look at the almanac awhile ago for?

A. We al' have right to look at the almanac whenever we want to know what day of the month it is, or anything.

Q. He denies threatening Hughes' life if he did not swear to a lie in this case?

A. He says he don't know anything about that.

Q. Let him deny it then.

A. Yes, sir.

Q. He denies it?

A. Yes, sir.

Q. Ask him if he denies telling Hughes that it would be dangerous if he testified against these men, that it would be dangerous to his life for him to go back home again.

A. He says he just told him this: That it is a dangerous thing to swear to a lie.

Q. Ask him if he didn't tell him if he did not swear favorably to his side of the case that his life would be in danger when he went home.

A. No, sir.

Q. He denies that, does he?

A. Yes, sir.

208 Q. Where was it that he saw Jim, the long-haired Indian on the day of the killing?

A. He was in Coo-wee-scoo-wee district on Grand River.

Q. How does he know that was on the 22nd day of September? Did he look at the almanac?

A. For this reason: There was to be a fish killing on the 22nd.

Q. When did he go to the house where the killing occurred?

A. Something near a week.

Q. Why didn't go sooner; he is related to Hickory; why did he not go sooner?

A. He says there was a great many people around, and he just didn't want to go.

Q. Why?

A. He says he never likes to let everybody know about what he thinks.

Q. Did he see Hickory?

A. No, sir; he didn't see him.

Q. Where was he? Did he learn where he was?

A. They said he was out on Frand River, some place.

Q. On the scout?

A. Yes, sir; just going from one place to another.

Q. Then he wasn't on the scout?

A. He says he guesses he might have been.

Q. How does he know it?

A. He says he heard that he was just going from one place to another; he would hear of him being at this place, and then at another place.

Q. Ask him if he does not know that he left his wife at home, away from him, while he was on the scout?

A. No, sir; he didn't know.

Q. Was his wife with him—Hickory?

A. He says he don't know only what he heard about it. He don't know even whether he was married or not.

Q. The woman that he was living with?

A. He says they were both at Aleck's; that woman was there.

Q. Both Hickory and the woman?

A. Yes, sir.

209 Q. After the killing?

A. No; there wasn't either one of them there then.

Q. What became of the woman?

A. She just went first one place and then another.

Q. Did she go with Hickory?

A. No, sir; he don't know that.

Q. He knows she didn't go with Hickory, does he not?

A. No, sir; he says he could not say.

Q. Does he say that he is willing to swear that Hickory was not on the scout?

A. He says that he reckons that he was scouting.

Q. He never saw him himself?

A. No, sir.

Q. Ask him if he ever saw him from the time that the killing occurred until he was finally arrested last March.

A. Yes, sir.

Q. He has seen him?

A. Yes, sir.
Q. Where did he see him?
A. He says he saw him about three miles from his house on Grand River.
Q. In the woods?
A. No, sir; at the residence of Andy's, he says.
Q. What was he doing there?
A. Nothing.
Q. How long did he stay there?
A. He staid there a short time, four or five days.
Q. Then what became of him?
A. He said he was going back; going back that way.
Q. Was he armed?
A. He had a gun.
Q. Winchester?
A. Yes, sir.
Q. Did he have a pistol?
A. Didn't see any pistol.
Q. Does he know whether he had a pistol or not?
A. No, sir; he does not know.
Q. Did he tell him why he didn't stay at home?
A. Yes, sir.

Q. *Q.* Ask him what day of the week was it that he went up to
210 look at that house?

A. He says he could not say exactly; he went there several times.
Q. When did he go there first; what day of the week was it?
A. He said he didn't pay any attention to the part.
Q. Ask him if he saw any blood there; he has not mentioned anything about any blood.
A. No, sir; he didn't see any blood.
Q. He didn't look blood, I reckon, did he?
A. He said that these bullet holes is all that he saw.
Q. Ask him if he looked for the blood?
A. No, sir.
Q. Why not look for the blood if he saw evidences of a fight and knew that a white man had been killed?
A. He says he never saw any, and it had been about a week since it was done.
Q. Did he see a dead horse?
A. He didn't go out to see it.
Q. All he saw was these bullet holes?
A. Yes, sir; that is all.

Redirect examination:

At the request of Mr. Barnes the stenographer read the following question and answer, the second from bottom of page 197, asked by the district attorney in cross-examination:

Q. Did he (meaning defendant, Hickory) tell him why he didn't stay at home?
A. Yes, sir.

Mr. Barnes (of counsel for defense). The district attorney asked the witness if the defendant Hickory told him why he did not stay at home,

and he says that he did. I want the whole conversation. The notes of the stenographer show that the district attorney asked that question. That is asking for a conversation.

The DISTRICT ATTORNEY. What part of the conversation did
211 I get?

Mr. BARNES (of counsel for defense). He has gone into that conversation and I think I am entitled to the whole of it.

The COURT. No; he didn't go into it.

Mr. BARNES (of counsel for defense). I will put this question: Give the whole conversation at the time you talked with Hickory at the house of Andy's, which you were asked about by the district attorney.

The DISTRICT ATTORNEY. He wasn't asked about any conversation by me.

Mr. BARNES (of counsel for defense). Does the court overrule the question.

The COURT. I don't think he entered into any conversation. The court overruled the question.

(Defendants except.)

212 ISAAC SHADE, having been recalled upon behalf of the defense, was examined by Mr. J. Warren Reed, and testified as follows, to wit:

Question. Your name is Isaac Shade?

Answer. Yes, sir.

Q. You have been on the stand before?

A. Yes, sir.

Q. Do you know Bryant Hughes?

A. Yes, sir.

Q. How long have you known Bryant?

A. About 10 or 12 years; it has been a long time; since he was a boy.

Q. State if you had a conversation with him near the court-house, sometime ago, about what he knew about the case.

A. Yes, sir.

The DISTRICT ATTORNEY. State who was present.

Mr. REED (of counsel for defense). Were there any persons there except you and him?

A. Yes, sir.

Q. Who were there?

A. Thomas Keener and Joe Shade and myself.

Q. State what he said; just tell what he said.

A. He come to us and said he was a friend to us, and we told him yes, and he says, "I don't know anything against Tom at all, only what Aaron had told me to tell.

Q. Go on and tell everything that you remember that he said.

A. He said he was going to kill Aaron Carey's oath, because he was telling him what to say. He said he didn't know anything against Tom Shade.

Q. What else did he say? Did he say that he, Aaron, was trying to get him——

The DISTRICT ATTORNEY. Never mind that.

The COURT. Let the witness state it.

213 Mr. REED (of counsel for defense). Go over that again.

A. Aaron was getting him to swear against Tom, and he wasn't going to do it, or that he was going to kill Aaron Carey's oath on account of that. He said he didn't want to swear anything that wasn't so against anybody.

Q. What else did he say? Tell all he said, if there is anything else that you can remember that he said.

A. That is about all I know. That is about all I can remember that I know of.

Q. Did he say anything with reference to seeing either one of these defendants after the killing?

The DISTRICT ATTORNEY. All three of these witness' have been asked that question directly; the leading question has been put to all of them. It is very strange that everyone of these witnesses when they come to that part of it have to be prompted. All three of them have stopped, and have said they knew nothing else until they have been prompted by Mr. Reed.

Mr. BARNES (of counsel for defense). I don't understand that directing the attention of the witness to it is prompting him; we have a right to call his attention to it.

Mr. REED (of counsel for defense). If he had said anything about that tell what he said.

A. No, sir; he didn't say anything about it.

Q. Not that you remember?

A. No, sir.

Cross-examination:

The DISTRICT ATTORNEY. You are Tom Shade's uncle, are you not?

A. Yes, sir.

Q. And Joe is Tom Shade's father?

A. Yes, sir.

214 Q. And Keener is the cousin of the other man, is he not—of Hickory?

A. Yes, sir.

Q. The father of Tom Shade, the uncle of Tom Shade, and the cousin of Hickory, got with these Government witnesses—you know this man was a Government witness when you were talking to him, did you not? You three fellows, you three men, all of you closely related to this prisoner, had this conversation with this Indian you talk about, you three men and nobody else there, was there?

A. Yes, sir.

Q. Who else?

A. Just us three, I think; I am not certain.

Q. Why didn't you take somebody after he had told yo' that that didn't have any interest in the case; that was not any relation to the prisoners, and have him say it in their presence?

A. Wel', he just came up and told us matters; we didn't ask him to tell anything at all.

Q. When was it?

A. The Wednesday after we come.

Q. What day of the month was it?

A. I don't know what day of the month it was.

Q. Where was it, now?
A. It was out here by this little building.
Q. And it wasn't at the hotel?
A. No, sir.

Redirect examination by Mr. THOS. H. BARNES:

Q. Do you know when you came?
A. Yes, sir; this was when we first came; I have been back home and came here again.
Q. You were supœna'd here on the 20 of July?
A. Yes, sir.
Q. It was on the Wednesday after you came here, then?
A. Yes, sir.

215 Mr. BARNES (of counsel for defense). I want to offer the statement of the physician who examined the body of Joseph Wilson after he was found. The name of the doctor is Blake. He was here as a witness and his statement was taken, and he was permitted to go home.

The DISTRICT ATTORNEY. I would rather that the statement not be read until Monday morning. I will try to have the physician here by that time. I would rather have him here. The statement is not quite as he stated it to me. If I do not have him here Monday morning it can be read then.

216 JOE SHADE, having been duly sworn upon behalf of the defense, was examined by Mr. J. Warren Reed, through Interpreter Walkingstick, and testified as follows, to wit:

Question. Ask him his name.
Answer. Joe Shade.
Q. Ask him what relation he is to Tom Shade here.
A. That is his son.
Q. Ask him if he knows Bryant Hughes.
A. Yes, sir.
Q. Ask him if he was present at any time since this term of court was going on, and heard any statement made by Bryant about what he knew in this case.
A. Yes, sir.
Q. Ask him when it was.
A. It was on Wednesday.
Q. Whereabouts was it, and who was there?
A. It was out here [indicating] somewhere.
Q. Who was present?
A. Isaac was one, and Aleck Stock, and Ollie and Joe Keener was there, too.
Q. Is that all?
A. Yes, sir.
Q. Tell him to tell what Bryant Hughes said.
A. He says he tol' Tom Keener that didn't know anything about the case 'bout these boys.
Q. What else did he tell them? Tell him to just commence and tell all of it.

A. He says he told him this: That Aaron was instructing him the way to state it; and the reason he was doing that, was because he had hit him here somewhere on the shoulder, and he said that Aaron told him that he was going to work hard against him for that reason.

Q. What else did he say?

A. That was as far as he went.

217 Q. Ask him if he remembers anything else that he said ab'ut Tom here, or Hickory.

A. No, sir; he says that is all.

Q. Ask him if he ever offered Bryant Hughes a horse to swear falsely in this case.

A. No, sir; he says he never does anything of that sort; he said that Bryant Hughes wou'd just tell anything. He says he is not right.

Cross-examination by the DISTRICT ATTORNEY:

He is the father of Tom Shade?

A. Yes, sir.

Q. And he is right su'e that he would not tel' anything for his son?

A. No, sir.

Q. Where did his son live at th' time that this killing occurred?

A. He lived at his house there.

Q. Was he staying there that week?

A. No, sir; went off Saturday, him and his wife together.

Q. Where did they go?

A. He went to John Johnson's.

Q. How does he know he went to John Johnson's?

A. He told him so.

Q. Told him he was going Johsnon's?

A. Yes, sir.

Q. When did he come back to his house and bring his wife home?

A. On th' next Saturday.

Q. Came back to his house on the next Saturday?

A. Yes, sir.

Q. So he does not know anything about where he was during any part of that week, even up to Saturday?

A. Yes, sir; he heard of him late Tuesday evening when he was at Tahlequah.

Q. He himself does not know where he was?

A. No, sir.

Q. Did Tom own a gun?

A. No, sir.

218 Q. Didn't own a Winchester?

A. No, sir; didn't have anything.

Q. Did he own a pistol?

A. No, sir; he said he didn't have anything.

Q. Does he know Hickory?

A. Yes, sir.

Q. Did he see him after this shooting?

A. No, sir.

Q. Hickory went on the sc'ut, did he n't?

A. He says he don't know that either.

Q. What relation is he to Hickory?
A. Not any.
Q. He is no relation to Hickory?
A. No, sir.
Q. Is Tom Shade and Hickory any relation?
A. No, sir.
Q. Are they any akin?
A. That is what I asked him.
Q. They are n't related in any way, are they?
A. No, sir; they are not related in any way. He just goes on to explain t'at Sam's mother——
Q. Are they related, Sam's mother and Hickory's mother?
A. No, sir; he says Tom's mother was a white woman.
Q. He says the two defendants are not related?
A. No, sir.
Q. Ask him if he saw Hickory pretty often before this killing?
A. No, sir.
Q. How far d'd he live from here?
A. About 20 miles; something like that; about that.
Q. Ask him if Tom Keener was out here at this conversation he speaks about.
A. Yes, sir.
Q. Himself, his brother Issaac, Aleck Stock, Ollie, Joe Keener, and Tom Keener?
A. Yes, sir.
Q. Anybody else?
A. No, sir.
Q. And it was there that he had the talk with Bryant Hughes?
A. Yes, sir.
219 Q. And it was there that these other people heard what he has said he said, didn't they?
A. Yes, sir.
Q. All of them heard it?
A. He says he supposes they did.
Q. He never had but the one talk, did he?
A. Yes, sir; that is all.
Q. Ask him if he went up to the place where the white marshal was killed?
A. No, sir.

Redirect examination by Mr. THOS. H. BARNES:

He says that he is not related to Hickory at all, and if anybody says he is related to Hickory, that he is his uncle, it is a mistake, it is not true. He says they are not any relation at all; he says that he was left an orphan.
Q. Are you certain that you interpreted Isaac right when he said he was an uncle of this fellow?
A. I don't remember.
Q. What does he say about being left an orphan?
A. He was left an orphan when he was a small child.
The DISTRICT ATTORNEY. The witness himself was left an orphan?
A. Yes, sir.

Mr. BARNES (of counsel for defense). Doesn't know much about his relatives?

A. No, sir; not much.

Q. If he is any relation to Sam here, he does not know it; is that it?

A. Yes, sir.

Q. If Sam and Tom are any relation he does not know that?

A. No; he does not know that either.

Here court adjourned until Monday morning, Aug. 22nd, 1892.

220 MONDAY MORNING, *August* 22, 1892—9 o'clock a. m.

MACK QUINTON, called on behalf of defendant, testified as follows:

Examined by Mr. REED (of counsel for defendants):

Question. Have you been sworn?

Answer. No, sir.

Q. Stand up and be sworn. (Witness sworn.)

Q. Do you know Arch Downing?

A. Yes, sir.

Q. Do you know Bryant Hughes?

A. Yes, sir.

Q. State if you heard a conversation between them or a statement by Bryant Hughes, anything about this case, and where you heard it, and when it was, if you remember?

A. It was Wednesday night, I believe. I heard him tell Arch Downing—he says he did*n* not know anything against these boys.

Q. It was Wednesday night, you say?

A. Yes, sir; I believe so.

Q. Whereabouts was it at?

A. At the City Hotel.

Q. What did Bryant say?

A. He said he didn't know anything against these boys.

Q. What else did he say?

A. That is all he said.

Q. Give all the conversation; how did it come up, and all about it?

A. Well, me and Dave Downing come along when they was talking.

Q. You and Dave Downing came up while Arch Downing and Bryant Hughes were talking?

A. Yes, sir.

Q. And you heard him say that?

A. Yes, sir; that is all I heard.

221 Q. Think a moment and see if you can't think of something else. Can you remember anything else that he said?

A. That is what I heard; me and Dave Downing come to where they was talking. He said there was a fellow told him what to tell.

Q. He said there was a fellow told him what to tell?

A. Yes, sir; he didn't name who it was.

Cross-examination by the DISTRICT ATTORNEY:

I thought you said the other was all he said. I thought you said all he said was that he didn't know anything.

A. He said he didn't know anything against these boys.

Q. And that was all he said. You have sworn twice that that was all he said. How come you to think about the other?

A. I forgot that.

Q. It took you a long time to think about it, didn't it?

A. Yes, sir.

Q. Anybody tell you to tell the other?

A. No, sir.

Q. Why did it take you so long to think about it?

A. Because I had forgotten; I didn't think I would come in a witness here.

Q. When did you come to be a witness in this case?

A. Yesterday, I guess.

Q. What are you down here for?

A. I was down here a witness.

Q. What case?

A. Wilson Campbell's.

Q. A witness for Wilson or for the Government?

A. For the Government.

Q. Arch Downing didn't say anything about your being here. How did they find out you was here; did you tell them about it?

A. Arch Downing come and asked me if I heard that.

222 Q. You went up there and heard them say he didn't know anything about it, and that is all you heard?

A. I heard that other.

Q. Said somebody told him what to say. He didn't say what his name was?

A. No, sir.

Q. He didn't say Aaron Carey?

A. No, sir.

Q. You staid there the rest of the time?

A. No, sir; I went away.

Q. Just got there in time to hear that, and then went off?

A. Yes, sir; went off.

Q. Are you a Cherokee?

A. Yes, sir.

223 DAVE DOWNING, called upon behalf of the defendants, and testified as follows, to wit:

Examined through court interpreter by Mr. REED:

Question. Ask him what his name is.

Answer. Dave Downing.

Q. Does he know Arch Downing?

A. Yes, sir.

Q. Does he know Dave Quinton and Bryant Hughes?

A. Yes, sir.

Q. Ask him if he heard any talk between Arch Downing and Bryant Hughes about this case since he has been here?

A. Yes, sir; he heard it.

Q. Where was it at?

A. At a hotel down here.

Q. What was the name of it?
A. He don't know.
Q. When was it?
A. It was either the second day or the third day of this month.
Q. What did Bryant Hughes say, if he heard him say anything, to Arch Downing about the case?
A. He says he had come to the hotel from this way, and they was there, Bryant Hughes and Arch Downing, and he heard Bryant Hughes tell Downing that he didn't know anything about this case, and all he knew was just what he had been instructed to tell.
Q. Did he say who instructed him, did he hear?
A. No, sir; he didn't hear that. He says "we went away then."
Q. Who was with him at the time?
A. He says it was Quinton.
Q. Mack Quinton?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Are he and Arch Downing brothers?
A. Yes, sir.
224 Q. Ask him how far he lives from Tom Keenan's.
A. About 20 miles.
Q. How far did they live from this Downing here—from where Hickory lives—old Aleck's?
A. About six miles.
Q. Ask him what he is doing down here?
A. A witness.
Q. What case?
A. He is a witness in Wilson Campbell's case.
Q. He and Mack are both witnesses?
A. Yes, sir.
Q. All that he knows about this case is what he has learned since he has been here?
A. That is all.
Q. He just went up there and stayed long enough to hear this talk, and then went away, didn't he?
A. Yes, sir; that is all.
Q. Didn't hear anything before or after?
A. No, sir.
Q. Did anybody send him or tell him to hear the talk?
A. No, sir; he was just going along.
Q. Bryant Hughes was just talking right out to everybody?
A. Yes, sir; he says he was telling Arch Downing, though, particularly.
Q. Talking out loud, and when they came up he didn't stop, but went right along?
A. Yes, sir.
Q. Were they in the hotel?
A. Out on the outside.
Q. I suppose there was a good many other people out there, wasn't there?

A. Yes, sir; he says there was a good many people around there, but then they wasn't right close to them; they was a little piece from the rest.

225 Redirect, by Mr. REED:

Ask him if he knows Sam Hickory, and how long he has known him.

A. He says he has known him ever since he was a child.

Q. Well, is he acquainted around through the neighborhood where Sam lives?

A. Yes, sir.

Q. Among the people around there?

A. Yes, sir.

Q. Does he know Sam's character as a peaceable, quiet, and law-abiding citizen there, from what the people say about him?

A. Yes, sir; he says it is that way.

Q. Ask him if up to the time of this charge against him it was good or bad.

A. It was all the same up to this time; he had a good reputation.

Recross, by the DISTRICT ATTORNEY:

Ask him if he knew that Sam was ever charged with any offence before this time.

A. No, sir; not anything in the Cherokee Nation; he wasn't charged with anything there.

Q. Ask him if he wasn't charged at this court?

A. Yes, sir; he believes he was down here once for whiskey.

Q. How many times was Sam down here for whiskey?

A. That is the only time he recollects of; just the one time.

Q. Then he had another charge against him for whiskey when he was arrested; that was what the officers were trying to arrest him for?

A. Yes, sir; he guesses so.

Q. How many charges for whiskey does a man have to have
226 against him before he has a good character as a peaceable and law-abiding citizen?

A. He asks whether he violates the Cherokee law or the United States law.

Q. Any law on earth.

A. He don't know how they have got it arranged.

Q. Ask him if it makes any difference in his estimation of a man whether he violates a United States law or a Cherokee law.

A. He says if it is in the Cherokee Nation he is always respected ever afterwards.

Q. That is, if he violates a United States law?

A. No; it is a Cherokee law that he meant.

Q. If he violates a Cherokee law he is respected?

A. He says if he is in jail he is not much respected there.

Q. How is it if he is in jail here?

A. He reckons it is just the same.

Q. What was it he said about a man being respected ever afterwards?

A. He says he understood that different; he though' that if a man came clear, then was when he was respected.

Q. Did he come clear of the charge down here when he was charged with whiskey?

A. No, sir; he was in jail.

Q. In jail for that?

A. Yes, sir.

Q. For how long?

A. He don't know just how long; but then he knows he was in jail.

Q. Was he sent off?

A. No, sir.

Q. He thinks that notwithstanding he has been convicted for one violation of the law and had a writ against him for violating it again at the time this killing occurred, he still thinks his character for a law-abiding citizen was good, does he?

227 A. Yes, sir; in the Cherokee Nation it would be, because he has not violated any law there; but here, of course, it is on record.

Q. He still thinks his character is good, although he has violated a United States law?

A. He says he never thought anything.

Q. Does he still think he has got a good reputation?

A. He could not say.

Q. He don't know whether his reputation is good or not, does he?

A. He says he could not say, now.

Q. He don't know?

A. No, sir.

Q. What he meant to say was that his reputation was good in the Cherokee Nation, because he had violated no Cherokee law that he knew of?

A. Yes, sir.

Q. Suppose an Indian should murder a white man, and then rob another white man, and then rape a white woman, any one of which would not be a violation of the Cherokee laws, does he think that man's reputation would be good if he had not violated a Cherokee law?

Mr. BARNES. You put that as a test of the way he forms his opinion, not that you charge it against these defendants?

The DISTRICT ATTORNEY. I put that as a hypothetical question.

(To interpreter.) Does he think his reputation would be good because he violated no Cherokee law?

A. He says he could not say as to that.

(Witness excused.)

228 JOSEPH SHADE, being called on behalf of the Government, and examined through court interpreter, testified as follows, to wit:

Examined by Mr. REED:

Q. What is his name?

A. Joseph Shade.

Q. Ask him if he understands Cherokee?

A. Yes, sir.

Q. And reads Cherokee?

A. Yes, sir.

Q. Ask him if he ever saw Sam Hickory here write, and if he knows his handwriting?

A. Yes, sir.

Q. Tell him to look at this paper and see whether that is Sam's writing [handing witness paper marked Exhibit A].

A. He says he is not an expert in writing Cherokee, and could not say as to that. He says he could not read Sam's writing much, because he writes a good hand, and this is very poor.

Q. Ask him if he has seen Sam write?

A. Yes, sir.

Q. Ask him how much he ever saw him write; if he has been around him much?

The DISTRICT ATTORNEY. He says he don't know whether it is Sam's or not. I submit, your honor, that that is an answer to the question.

The COURT. If he is not able to say it is Sam's handwriting, that settles it.

Mr. BARNES. He says Sam writes a good hand, and that is a poor hand.

229 The COURT. I think I heard what he says, and I think he said he didn't know Sam's writing.

The DISTRICT ATTORNEY. He said he was not an expert.

INTERPRETER. He says he could not fully understand Sam's writing.

Mr. BARNES. Does he know it well enough to know whether that is his handwriting or not?

A. He says that is not Sam's handwriting.

Mr. REED. Tell him to explain how he knows.

A. He says that *us* a poor handwrite; that is something like the hand he writes, and he can read that. He says Sam's is a good hand, and he can't very well read his handwriting.

Q. He calls that a poor handwrite, and says Sam writes a good handwrite?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY (through interpreter):

(Handing witness piece of blank paper.) Q. Tell him to write in Cherokee the following [witness writes]:

"October 15, 1891."

INTERPRETER. He says he can't write very good.

The DISTRICT ATTORNEY. Tell him to go on and write: "Ollie: I write you a few lines. You must never tell how this is."

INTERPRETER. He says he can't write good, and there is a letter there he can't make.

230 Q. (Handing witness letter marked Exhibit A.) Tell him to get up there and read that.

(Witness reads.) "October 15, 1891. Ollie: Write you a few lines. You must never tell how this is about what Tom done. Say that I was the only one that did it. You must not tell anybody about him killing the horse. You must not. This I tell you. That is all. I write in haste. Sam."

Q. Now, he said awhile ago that he was not an expert in Cherokee writing, and could not tell whether that was Sam's or not, and then afterwards turned around and said it wasn't Sam's. What does he mean by that?

Q. Well, he says would he be allowed to make a statement. He says he hasn't been sworn.

Q. Is that the reason he said he didn't know this was Sam's, and could not tell, because he hasn't been sworn?

A. No; it wasn't for that reason. That is not Sam's handwrite.

Q. Why did he say he could not tell, then?

A. Well, he says for this reason, that in the Cherokee courts a man takes an oath.

Q. And he has not taken an oath here?

A. No, sir.

Q. That is the reason he said that, because he wasn't sworn?

A. He said if he was sworn he would just have to say the same thing.

Q. Why did he say he could not tell whether it was Sam's handwriting or not?

231 A. Well, there is a difference in the handwrites. Sam writes an entirely different handwrite.

Q. If that is true, that is only a stronger reason why he should not have said that he wasn't an expert, and didn't know. Why did he say that?

A. He says he could read that very readily, but Sam's handwrite he could not.

Q. Why is it, if he knows that is not Sam's handwriting—why was it, when he first went upon the stand, he said he wasn't an expert in Cherokee writing, and could not tell whether it was Sam's handwriting or not?

A. Well, he says that other attempt he made just a few minutes ago to read it, he failed; he didn't know all the letters; he says there is difference in the handwrites; that that other is entirely different.

Q. Because it was different from Sam's handwriting, was that the reason he didn't know? That might be a reason why he would know it wasn't Sam's?

A. Yes, sir; for that reason he says he knows at once that this was a different handwrite, and could read that very readily.

Q. The reason he said he could not tell whether it was Sam's or not was because it was different from Sam's handwriting. Is that it?

A. Yes, sir; for that reason; there is difference in handwrites.

Q. That is the reason that he could not tell if there was any

232 difference when he first went on the stand?

A. He says yes, sir.

Q. If it had looked like Sam's he would have thought it wasn't Sam's?

A. Yes, sir; he says Sam didn't write like that.

Q. He swore when he first went on the stand that he wasn't an expert and could not tell, and he afterwards says it wasn't. If he knows that isn't Sam's handwriting, ask him why it is he said he didn't know?

A. Well, he says he hadn't seen that paper, that writing.

Q. Does he swear he hadn't seen that? Ask him if he didn't see that in the lawyer's office, on the other side.

A. Yes, sir; over there.

Q. Why does he swear this is the first time?

A. In here he says.

Q. Ask him if he didn't see it in the lawyer's office?

A. Yes, sir.

Q. Ask him what has seeing it in here to do with it?

A. Well, when he saw it here, he thought that was the one they had over there.

Q. He ought to have been able to say at once that it wasn't Sam's handwriting, but instead of that, he said he didn't know, he could not tell?

A. He thought he had no right to tell anything that he knew back there.

233 Q. This man either hasn't sense enough to testify, or else he don't understand what you are saying to him. He doesn't give an intelligent answer to anything I say to him. He is Tom Shade's father, isn't he?

A. Yes, sir.

Q. Is he any relation to the other man?

A. No, sir.

Q. How far does he live from Sam?

A. About twenty miles.

Q. Has he lived twenty miles from him always?

A. About eight years ago he lived a little nearer.

Q. How much nearer.

A. About five miles.

Q. Ask him if Tom Shade and Sam were great friends, together a good deal?

A. No, not all the time. He says Tom was at his house, living there.

Q. Sam would often come to see Tom; quite warm friends; run together.

A. He didn't come there but one time.

Q. When was that?

A. On Christmas. It will be two years next Chistmas; about that.

Q. Is that the only time Sam was ever at his house.

A. Yes, sir; that is the only time.

Q. Well, I suppose Tom was often over to see Sam, wasn't he?

A. He says he don't know of that.

234 Q. Well, he often goes over to see Sam himself; don't he?

A. No, sir.

Q. Did he ever go over to see him?

A. No.

Q. Did he ever go over to Aleek's when they were there?

A. No, sir.

Q. Then I would like to know how it was he seen Sam write so often; ask him that?

A. He says that that Christmas Sam was there, he was writing, and he has got a paper in his pocket he wrote.

Q. That was the only time he saw him write, was it?

A. Well, during the time he was at his house a little girl of his would be writing at nights.

Q. That was the only time he ever saw him write?

A. Yes, sir.

Q. Tell him to let me see the paper?

(Witness produces paper.)

Q. Ask him what he is doing with this paper here?

A. Nothing; just had it in his pocket.
Q. What is the paper about?
A. Just tells about the little girl being well.
Q. Did Sam write that while he was there?
A. Yes, sir.
Q. How is it that he kept it; carried it in his pocket all the time?
A. No, sir; the girl had it about her at home.
Q. What did he bring it here for?
235 A. He said he had heard of this other writing, and he thought he would bring this along and compare them.
Q. Tell him I will hand him this after while; I want to keep it.
(Above paper is marked Exhibit X.)
Q. And the only time he saw Sam write was at his house?
A. Yes, sir; the only time.
Q. Hasn't seen him write for two years, and never did before, and hasn't since?
A. No, sir.

Redirect by Mr. BARNES:

Ask him if it will be two years ago next Christmas, or if it was two years ago last Christmas.
Q. He says he couldn't say.
Q. I just want to ask him this one question. Tell him that Judge Clayton has said to him that at the same time he said he wasn't an expert in Cherokee writing, he said he didn't know whether this was Sam's handwriting or not. Ask him if he didn't say that this was poor handwriting like he writes, and that Sam writes a good hand.
A. He says he just said this; he says he couldn't write a good hand himself, and can read a poor hand, just like that.
Q. Ask him if he didn't say Sam wrote a good hand, hard for him to read.
A. He says that is not Sam's handwriting; that it is a very poor hand.
Q. Did he say that Sam writes a good hand?
A. Yes, sir; Sam writes a good hand.

236 TOM KEENER, being called on behalf of defendant, and examined through court interpreter, by Mr. Reed, testified as follows:

Q. He stated about knowing Sam Hickory here; ask him if he ever saw him write?
A. Yes, sir; he has seen him writing.
Q. Has he seen him writing many times?
A. Yes, sir.
Q. Had letters from him?
A. Yes, sir; he says he has got letters from him several times.
Q. Ask him if he knows his writing?
A. Yes, sir.
Q. [Handing witness paper marked Exhibit A, produced by witness Cochran.] Tell him to examine this paper, and see whether that is Sam's writing or not?
A. He says Sam does not write like this.
Q Ask him if he can explain the difference between Sam's writing and that writing?

A. He says there is a difference. He says that is a poor hand write.

Q. Tell him we want him to explain the difference.

A. He says he knows Sam's way of writing, and he shapes his letters different to this. He don't make his letters like they are there.

Q. [Handing witness paper.] Ask him whose writing this is?

The DISTRICT ATTORNEY. Never mind, I object to that.

Mr. BARNES. That is some writing the defendant did this morning. I think I have a right to compare the two.

237 The COURT. You would have to show it was the defendant's handwriting.

Mr. BARNES. Then let the defendant write before him?

The COURT. That would be manufacturing evidence. The rule is that a party has no right to use written evidence which has been made inside of the court. If he did he might manufacture evidence to benefit his case.

Mr. BARNES. I understand the court to rule it out on the ground the *the* defendant can not write in the presence of the witness for the purpose of identifying his handwriting.

The COURT. In the first place, you haven't shown that it was the defendant's handwriting.

Mr. BARNES. We offer to show by the defendant that it is his handwriting.

The COURT. Better call the defendant on the stand and examine him.

The DISTRICT ATTORNEY. Let me cross-examine the witness first.

Cross-examination:

Q. You say you know the defendant's handwriting; is that it? [Handing witness paper marked Exhibit A.]

A. No, sir; he says it is not.

Q. [Handing witness paper marked Exhibit X.] Ask him if that is it?

A. He writes like that, he says.

Q. Is that his handwriting?

A. Yes, sir; he says that is Sam's handwriting.

238 Q. Have him read the date on that; I want to get the date.

A. August 8th, 1890.

Q. He is certain about that, is he?

A. Ask him if that is Sam's signature?

A. He says he reckons so.

Q. Well, he knows Sam's handwriting?

A. Yes, sir; it is Sam's handwriting.

Q. Ask him if Sam staid at his house any after this killing?

A. He stopped with him about three days.

Q. Ask him if he himself didn't go and get him and take him to his house?

A. No, sir.

Q. Where did he run across him?

A. He found him out in the field where he was pulling corn; he come there, he said.

Q. What was he doing at his house?

A. Not anything.

Q. Hiding?

A. No; it didn't seem so.

Q. When was it?

A. It was sometime after; he reckons it must have been about two weeks after.

Q. How long did he stay?

A. He says he staid two nights, two days, and he left the third night. He says he left for Tahlequah then.

Q. Was he ever at his house any more?

A. No, sir; he didn't see him any more after that.

Q. When did he come down here this term?

239 A. He thinks it was the first Monday in August.

Q. This letter is dated 8th of August, 1890. He and the witnesses in this case came down here about the first Monday in August, did they?

A. He said he wasn't a witness when he first came down.

Q. What did he come down here for?

A. Well, he just thought he would come down and be around.

Q. What for?

A. And be present at this trial.

Q. What for?

A. Well, he just thought he would be present at the trial of these prisoners.

Q. Did he come down to help them?

A. No, sir.

Q. What did he come down for?

A. Well, he says he just thought he would be here and be present at these trials.

Q. What relation is he to Sam?

A. He says he told you that yesterday.

Q. Tell him it won't hurt him or kill him to tell it again, and to go ahead and answer my question, and to do it pretty quick.

A. He says he is his aunt's daughter's son.

Q. Ask him if the Cherokees have Christmas the same as we do—on the 25th of December?

A. Yes, sir; at the same time.

Q. The eighth of August isn't Christmas times up in their country, is it?

A. No, sir.

240 Redirect examination:

Mr. BARNES. Now tell him to take these two papers (A and X) and if there is any difference in them to point out what it is.

The DISTRICT ATTORNEY. You haven't proven him to be an expert.

Mr. REED. Have you been educated in Cherokee?

A. Yes, sir; he knows Cherokee.

Q. Ask him if he knows enough to explain the difference in the characters used in the handwritings?

A. Yes, sir; he says there is a great difference in the writing.

Q. Ask him if he has seen much of Sam Hickory's handwriting?

A. Yes, sir; many times.

Q. Tell him to explain the difference in the characters in these two papers.

A. He says there is a difference. He says the writing in that paper (X) is a fine, good hand, and a poor hand in this other (A).

Q. Ask him if they are the same handwrite?

A. He says that one (X) is Sam's handwriting, and he don't know the other one.

Q. Tell him to take a character that is in each paper and to explain the difference.

A. He takes the character representing the sound 'wah.' He says there is a difference in the shape of the letters, the way they are written, but of course they both mean the same thing.

241 (Witness points out similar characters in both letters, and shows difference in formation.)

A. He says this one (A) is the work of a poor writer, and this one (X) is good handwriting.

Q. Tell him to give another character.

Q. He takes the letter 'gih.' He says that in this letter (X) they are all straight, and he says in the other one there is a difference.

Recross-examination by the DISTRICT ATTORNEY:

Ask him if there is any difference in the signatures of those two letters, except that one is larger than the other.

A. He says that one is larger than the other.

Q. Ask him if that is not the only difference. Tell him to look at that character that looks like A turned upside down, in both letters, and see if they are not made exactly alike, even to that curve on the right-hand side, except that one is larger than the other.

A. Well, it would be the same, he says.

Q. If they were the same size, he would think the same man wrote it, wouldn't he?

A. Yes, sir.

Q. Ask him if he wouldn't think the same man wrote both of those signatures if they were the same size?

A. He says he don't know this handwriting (A), but this one (X) he does.

Q. Tell him to stick to that signature. Ask him if they ain't the same.

A. He says if you look up here and down here you can tell the
242 difference.

I want him to look at the signatures and see if he can see any difference.

A. Well, he says that is the way you have got to read it when you read it.

Q. Tell him to answer yes or no, whether there is any difference in the handwriting?

A. He says there is a difference.

Q. What is it?

A. He says all the letters in here are uniform——

Q. Hold on.

Mr. BARNES. Let him go on and state what it is.

The DISTRICT ATTORNEY. I asked him about the signatures. He ought to be fined for contempt. Ask him what is the difference in that signature, except the size.

A. He says if you was writing the word 'Sam' that is the way you would write it.

Q. Does that tell the difference?

A. He says there is a difference.

Q. What is the difference? Are the shape of these two letters different?

A. There is some, he says.

Q. Any difference except in the size?

The WITNESS (in English). I told you several times that was Sam's name.

The DISTRICT ATTORNEY. Now, you talk to me in English. Is there any difference in these two letters except in size? Talk to me in English the best you can. I won't take any advantage of it. You have told me that is Sam?

A. (Through interpreter.) He says you can make letters in different shapes.

243 Q. Is there any difference in the shape of that letter, and that letter, and that letter, and that letter [pointing to signature]?

A. He says no, sir.

(Witness excused.)

244 SAM DOWNING, the defendant, being called in his own behalf, and examined through interpreter, testified as follows, to wit:

Mr. BARNES. Ask him if he wrote this that I hand him at the table here this morning.

A. Yes, sir; he wrote it.

(Paper referred to marked Exhibit D.)

Q. [Handing witness paper marked Exhibit A.] Ask him if he wrote that.

A. No, sir; he didn't write that; it is not his handwriting.

Cross-examination:

The DISTRICT ATTORNEY. When did you write this [handing witness paper marked Exhibit D]?

A. Awhile ago.

Q. Here in court?

A. Yes, sir.

Q. He wrote this at that table?

A. Yes, sir.

Q. Ask him if that is Sam [indicating on paper].

A. Yes, sir.

Q. Ask if those two are Sam [indicating].

A. Yes, sir.

Q. Ask him why there is so much difference in the way he has written Sam in the one he wrote this morning and in these other two.

A. He says you write Sam different from what you write it here.

Q. Ask him why he does that. Ask him if the Sam on this one marked A ain't a good deal more like the one on the paper marked X than the one he wrote this morning.

A. He says it means the same, but the shape of the letters are different.

Q. The shape of the letters on the paper marked A and the shape of the letter on the one marked X are exactly the same.

245 A. He says they are alike.

Q. The letter we claim he wrote and the one he swears he wrote are the same. Ask him if the one he wrote this morning and the one Joe Shade took out of his pocket (marked X) are not entirely different.

A. Yes, sir; he says there is a difference in these; that sometimes he makes small letters and sometimes large; he says when he wants to he can do that.

Q. Ask him if the one Cochran handed to me (marked Z) and the one Shade brought here (marked X) are not exactly alike, except one is larger than the other.

A. He says they are just about alike, only one is larger than the other.

246 Mr. BARNES. I now desire to show to the next witness a paper written by the defendant, in the presence of the jury, for the purpose of comparison with the papers heretofore introduced, one of which defendant admits writing and the other he denies.

The COURT. The authorities say, "It is clear that a party should not * * * be permitted to manufacture evidence for himself by writing his name as a basis for comparison of hands by a jury." I read from Wharton's Law of Civil Evidence.

I read now from the case of King v. Donahue, in which the question was raised as to whether a party had a right to write his name in the presence of the jury. The supreme court of Massachusetts, in passing upon this question, say:

"Upon the question whether the genuine signature of the demandant had been subscribed to the instrument purporting to contain her release of the right of dower, she was not to be confined in her testimony to a mere general denial. She was entitled to whatever benefit could be derived from a comparison of the disputed signature with her genuine and undisputed handwriting. For that purpose she would be allowed to produce original letters or other documents, admitted or proved to bear her genuine signature, in order that the jury might make the comparison. But we do not find any case in which signatures made for the purpose of being examined have been so admitted. Lord Kenyon gave as the reason for the exclusion of such evidence, in the first of these cases, that 'the party might write differently from his common mode of writing his name, through design;" and the like reason was given by Lord Dennan, in Doe vs. Newton. It

247 is suggested in the argument that this consideration affects the *the* weight of the evidence rather than its competency. The rule, however, seems to be that a signature made for the occasion, post litem motam, and for use at the trial, ought not to be taken as a standard of genuineness, and that the jury should not be troubled with the additional issue or question whether the signature so offered is written in a constrained and forced manner or not. In the language of Coleridge, J., in Doe v. Suckermore, 5 A. & E., 703, 705, 'the test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore of itself permanent. And we best acquire a knowledge of this character by seeing the individual write at

times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.'"

In Stevens' Digest of Evidence it is said: "A person's signature, or other writing, made in court at the trial will not generally be allowed to be used for comparison."

It can not be used by him as original evidence, when it is manufactured. It is exactly for the reason that I first gave, that a party might disguise his handwriting. Of course the more expert the party is the more dangerous such evidence becomes. It becomes very easy for him to
248 formulate any hand that may be necessary. Comparison must be made with a document made by him when the purpose for which it is sought to use the document was not in view. I think it is a very strong and conclusive reason.

Mr. BARNES. To get this matter down right, we offer to show a writing which was made by the defendant, in the presence of the jury, to compare with the writing on the document marked X, as produced by Joseph Shade, written previous to this time, and also to compare with the writing marked A, offered in evidence by the district attorney.

The COURT. The court excludes the evidence. I don't think, if it was competent, that you could compare the writing with but one of the documents. One of those papers is not competent, except to compare with the original letter, and I don't think you can compare two letters, both of which are irrelevant in themselves; to which ruling of the court the defendant excepted.

Mr. BARNES. But we can compare these two (Exhibits A and X).

The COURT. Yes, sir.

249 G. W. BENGE, called on behalf of the defendants, testified as follows:

Examined by Mr. REED:

Where do you live?

A. Tahlequah.

Q. How long have you lived in the Indian country?

A. About ten years.

Q. At Tahlequah?

A. Yes, sir.

Q. That is the capital?

A. Yes, sir.

Q. What positions or offices have you held there?

A. Well, the first position I held was auditor of public accounts. The second, I was elected solicitor of the district; and third, I was elected circuit judge for the northern circuit of the Nation.

Q. What is your profession?

A. I am an attorney before the bar.

Q. Have you had much experience in Cherokee handwriting?

A. To a considerable extent.

Q. You was auditor for how long?

A. Four years.

Q. Then secretary how long?

A. I was elected auditor just before I moved to Tahlequah; just a short time before.

Q. In that position did you handle a great deal of Cherokee writing?

A. Yes, sir.

Q. You spoke of being secretary?

A. Not secretary; I was solicitor.

Q. In that capacity did you handle a great deal of Cherekee writing?

A. Yes, sir; I can give you my reasons how I came to do it. A prosecuting attorney has both prints of law to handle; he has both classes of cases to handle to the jury.

Q. Both English and Cherokee?

A. Yes, sir.

250 Q. Now, I want you to compare the writing in these papers marked Exhibits A and X. Compare them and see whether they are the same handwriting, and if there is any difference explain that.

A. There is some difference.

Q. Well, state if they are different handwriting.

A. Yes, sir; there is a difference in writing these letters from the faces of the two documents.

Q. Do they appear to have been made by different men?

A. Yes, sir.

Q. Well, now, explain that difference?

A. In the first place I would say that there is about as much difference in writing Cherokee characters as in writing English characters. Secondly, that a solitary mark in the Cherokee alphabet represents a sound. Each character represents a sound, distinct within itself. To do this properly, I expect I had better give the distinction I find in these two letters.

(Witness takes paper and marks the difference in the letters or characters in the two different papers, and shows same to the jury, showing the difference of construction of similar characters in the two letters or papers.)

Q. Those are the reasons why you say they are different handwriting?

A. Yes, sir.

Cross-examination:

The DISTRICT ATTORNEY. Well, if you were going to write a letter in English as long as that letter there, there would be a great many variations in the letters, wouldn't there?

A. Yes, sir.

251 Q. For instance, some of the "t's" might not be crossed, and some of the "i's" might not be dotted, and some of the "n's" might be turned up at the end more than the others, and some of the "w's" might have more of a hook on than the others?

A. Yes, sir; exactly.

Q. You could pick out many differences?

A. Certainly.

Q. It is not so with a signature, is it?

A. The signatures are nearly the same, generally.

Q. Please look at these two letters, marked Exhibits A and X, and tell me, if you knew that a person sometimes wrote small and sometimes large, if it would not be written by the same man, in your opinion?

A. I can see no difference only in coarseness.

Q. One is large and the other small?

A. Yes, sir.

Q. I will ask you, if you knew that a man sometimes wrote large and sometimes small, if you would not pronounce those two signatures the signature of the same man. I will ask you if it is not your opinion now that those are the same signature. You heard what defendant said about sometimes writing large, and sometimes small?

A. Yes, sir; I could only say that they resemble.

Q. Then in your opinion they are the same signature?

A. Yes, sir; looks to be the same.

Q. I will ask you if in your opinion they were not written by the same man?

A. They look to be the same handwriting, so far as the signature is concerned.

Q. You have said that there was as much difference in handwriting in Cherokee as there is in English?

A. Yes, sir.

252 Q. Well, I will ask you if you don't find many letters in those two papers that are formed alike?

A. No, sir; I do not. I might find some that would resemble each other. I might, possibly.

Q. You would think, then, that two men wrote the bodies of those letters, and that one man signed them?

A. That would be owing to the circumstances, of course. A man might possibly write like another one.

Q. Did you ever see two men write alike?

A. I have seen them resemble.

Q. So that you could not tell?

A. Yes, sir; I have seen men imitate others' handwritings.

Q. He might imitate it, of course. Then you take it that the bodies of the letters are different, but the signatures are the same?

A. It might be the same man's writing, but the characters are different.

Q. Do you think the same man wrote both letters?

A. I don't know.

Q. Give your opinion.

A. Well, I would not know how to express an opinion. The writing is at variance, and the signature is all that is the same.

Q. Take this case: A man writes two different hands, one large and one small, whenever he wants to; taking that into consideration, would you say it was two men who wrote these two letters?

A. I would simply say this, in answer to that, that the man who wrote this (Ex. A) may have written the other (Ex. X). That is quite

253 a difficult question to answer, because my opinion would only be balanced by the general make of the letters. There is four pages of that, compared with seven lines of that, and so far as the body of the letters is concerned, there is no similarity scarcely. No more than that in plain writing in English, and poor writing in the same language.

Q. Do you find any bad grammar in either one of them?

A. Yes, sir.

Q. Well, I have not read them, but I see in this (Ex. A), it starts off wrong.

Q. How?

A. Well, it starts off October 15, 1891.

Q. That is not a grammatical error.

A. Well, it hasn't got the place where it was written.

Q. If a man was on the scout, he wouldn't do that. That letter is purported to have been written by him when he was on the scout, so, of course, that could be accounted for, but I mean in the construction of the sentences.

A. Yes, sir; the word after the year, simply says, as I would interpret, "Now I write you, Ollie."

Q. Well, that is good; instead of saying, "I take my pen in hand," he says, "Now I write you." I have the interpretation of the letter here; listen and see if this is correct: (Reading.) "October 15, 1891. Ollie: I write you a few lines. You must never disclose how this is about what Tom done. Just say that I was the only one who did it. You must never tell anything about him killing the horse. You must not. This I tell you. That is all. I write in haste. Sam."

254 Q. Part of it is correct. To interpret it just as it is here it would be all backwards.

Mr. BARNES. Different persons in writing make some of their letters alike, don't they, as a rule?

A. Yes, sir; some writers do; yes, sir.

Q. You discover no resemblance in those letters you have, except in the signature?

A. That is all I find.

The DISTRICT ATTORNEY. Just read the date of that letter marked Exhibit X.

A. Well, it is August, and then figure 7, with an 8 on top of it—1890.

Q. It starts off just like the other letter, so far as putting the month first is concerned?

A. Yes, sir.

255 ARCH DOWNING, being called on behalf of the defendants, and examined through court interpreter, testified as follows, to wit:

Mr. REED. Ask him how long he has known these defendants.

A. He has known them since they was small.

Q. Has he known each of them for the same length of time?

A. Yes, sir.

Q. Well, ask him if he knows Tom Shade's character as a peaceable and law-abiding young man there in the community where he lives.

A. He says he is a peaceable and quiet kind of a man.

The DISTRICT ATTORNEY. The question is, peaceable and law abiding.

A. He don't say that; he says peaceable and quiet.

Mr. REED. Is that his character?

A. Yes, sir.

Q. Ask him if as a peaceable and law-abiding man, his character is good or bad?

A. He says he is a good, peaceable, and law-abiding man.

Q. Now, as to Sam Hickory; ask him if he knows his general character as a peaceable and law-abiding man?

A. It is the same.

Q. Is it good or bad?

A. It is good.

Cross-examination:

The DISTRICT ATTORNEY. Ask him if he has heard of Tom Shade being arrested a good many times.

A. He asks where.

Q. Here?

A. Yes, sir.

Q. How many times?

A. One time.

Q. Does he know of his being sent to the penitentiary?

A. No, sir.

Q. Hasn't he heard of his being arrested more than once?

256 A. No, sir.

Q. Has he heard of his being arrested in his own country?

A. No, sir; never did.

Q. What did he hear he was arrested for down here?

A. Whiskey.

Q. Did he know that he was under bond for whiskey at the time of this killing?

A. He didn't know that.

Q. He knew he was brought here once and punished for it?

A. Yes, sir.

Q. He didn't know that Cornelius Boundinot was on his bond for whiskey at the time of the killing; went on his bond just before election, and got him out of jail, so he could vote for him?

A. No, sir.

Q. Ask him how many times he has heard of Hickory being down here charged with crime?

A. Just once.

Q. Ask him if he knows the officers had a writ for Hickory a second time, when he went there and got killed?

A. No, sir; hadn't heard it.

Q. Ask him if it makes any difference in his opinion of a man when he is brought down here and punished for a crime?

A. He says it don't make any difference when a man comes back over there in the Territory.

Q. That makes no difference in his character?

A. No, sir.

257 PHILLIP BENNETT, being called on behalf of the defendants, and examined through court interpreter, testified as follows, to wit:

Mr. REED. Where does he live?

A. Tahlequah district.

Q. Is he a citizen of that country?

The COURT. Of course he is; no use in asking him that; we will take that for granted. Let's get along.

Mr. REED. Ask him what offices he has held up there.

Q. He says he has been a member of the legislature.

Q. What other office?

A. That is all.

Q. Ask him if he knows these two defendants here?

A. Yes, sir; he is acquainted with them.

Q. How long has he known them?

A. Ever since they were boys.

Q. Ask him as to Tom Shade; if he knows Tom Shade's character as a peaceable and law-abiding man in the community where he lives.

A. He says he has never been charged with anything at all in the Cherokee Nation.

Q. Ask him if his general character is good or bad as a peaceable and law-abiding citizen; what the people generally say of him.

A. It is good.

Q. Ask him now as to Sam Hickory; if he knows Sam Hickory's general character in the community where he lives as a peaceable and law-abiding man.

A. He says yes, sir.

Q. Is it good or bad?

A. Good.

258 Cross-examination:

The DISTRICT ATTORNEY. Ask him if he knows of both of these men being brought down here for whiskey and punished and sent to prison.

A. He says he thinks that may have been so.

Q. He has heard they have been brought here and punished for whiskey?

A. Yes, sir.

Q. Ask him if, besides that, he heard there were writs out for both of them for whiskey again.

A. No, sir.

Q. He didn't know that Cornelius Boundinot was on Tom's bond?

A. Yes, sir; he thinks so.

Q. Brought down here and punished once, and then on bond at the time of the killing? And he knew that Hickory had been brought down here and punished. Ask him if that made no difference as to their reputation, his knowing that they had been brought down here and punished for crime.

A. He says it doesn't make any difference.

Q. Ask him if he hasn't voted for men there who had been sent to the penitentiary?

Mr. BARNES. I don't think that is competent.

The DISTRICT ATTORNEY. I think I have a right to test his ability to testify as to reputation.

The COURT. I think he has a right to find out from what standard the witness makes his opinion. Reputation is largely made up from what people think of a man, and from their judgment, and it is proper to inquire as to the standard of that judgment.

259 Mr. BARNES. The court understands we except to the ruling.

The COURT. Yes, sir.

The DISTRICT ATTORNEY. Ask him the question.

A. No, sir; he don't remember of any.

Q. But he said that the fact that these men had been brought down here charged with whiskey offenses, and convicted, did not effect their reputation?

A. Yes, sir.

Q. Ask him if it does not make their reputation a little bit better, being brought down here for whiskey?

A. No, sir; he says not.

Q. He is a full blood Cherokee?

A. Yes, sir.

Here court takes a recess until half-past one o'clock.

260 MONDAY AFTERNOON, *August 22nd*, 1892—1:30 o'clock.

OLLIE WILLIAMS, having been duly sworn upon behalf of the defense, was examined by Mr. James Warren Reed, through an interpreter, as follows, to wit:

The DISTRICT ATTORNEY. You talk English, don't you?

Answer. No, sir.

Q. Who was the interpreter when you were talking to me in my room down stairs?

The INTERPRETER. She says it was me.

Mr. REED. Ask her where she was living at the time that it was said that a marshal was killed up there by the name of Wilson?

A. At Big Aleck's.

Q. Did she live at Big Aleck's then?

A. Yes, sir; she was staying there.

The DISTRICT ATTORNEY. Find out if she is this defendant's wife, or how she is living with him?

Mr. REED (of counsel for defense). Ask her who she was living with?

A. She lived with Sam.

Q. Ask her if she was ever married to Sam?

A. No, sir; they were not married according to law.

Q. Ask her if she remembers the day that the marshal came there?

A. Yes, sir.

Q. Where was she when the marshal came in the house? How did he come, that is, did he ride or walk?

A. He was riding.

Q. Riding a horse?

A. Yes, sir.

Q. Tell her to tell, now, what he first did, where he first came, and what happened?

A. He went to where Sam was.

Q. Where was Sam?

A. Just a little distance from the house.

261 Q. From the house?

A. Yes, sir.

Q. Which was was Sam from the house? First let her tell what Sam was doing, if she knows, when the marshal came.

A. He was harnessing the horses out there.

Q. What was he harnessing them to? Ask her if he had a wagon.
A. Yes, sir.
Q. Ask her where the wagon stood, as to the house.
A. Right close to the house, near a tree.
Q. Does she know the points of the compass—north, south, east, and west—so that she could explain which way from the house the tree was?
A. East from the house.
Q. There is where Sam was when the marshal came?
A. Yes, sir.
Q. Tell her to tell just what Sam and the marshal done.
A. The marshal fired the first shot.
Q. Tell her to tell what was done before she gets to that; tell what they all done.
A. He arrested Sam.
Q. What did Sam do when he arrested him?
A. He didn't do anything.
Q. What did he say?
A. He said "I *I* am arrested."
Q. After the marshal arrested Sam what did Sam do then with his team?
A. He unharnessed them.
Q. What did he do then?
A. He started to go to get a saddle.
Q. Could she understand the talk between the marshal and Sam?
A. No, sir.
Q. She could only state what he done then. What was Sam to get the saddle for, does she know?
A. He was going to saddle his horse.
262 Q. What for?
A. To ride.
Q. Where was he going to ride to?
A. The way he was being taken—the way he was going.
Q. Going to ride with the marshal, was he?
A. Yes, sir.
Q. When Sam started to get the saddle where was the marshal at?
A. He was right by this tree that she speaks of.
Q. Where did Sam start to go to get the saddle?
A. In the house.
Q. When he started for the saddle what occurred then? What did the marshal do?
A. He shot at him.
Q. Shot at who?
A. Sam.
Q. Where was Sam at the time that the marshal shot first?
A. He was going in the house.
Q. About where was he—about how far towards the house was he at the time that the marshal first shot?
A. He was a little on the outside; hadn't got in the house yet.
Q. When the marshal shot first what did Sam do?
A. He went in the house.
Q. How did he go, run or walk?

A. Walked; went in slow.

Q. Did the marshal shoot any more?

A. Yes, sir.

Q. Did she see him when the shooting commenced? Ask her if the first time that the marshal shot if she could see how he held his pistol.

A. No, sir.

Q. She don't know how he held it. Did she see how he held it the second time?

A. No, sir.

Q. When he shot the second time which way did the smoke go?

A. In the direction of where Sam was.

Q. At the time that he shot the second shot where was Sam then?

A. He was going in at the door.

263 Q. The second shot?

A. Yes, sir.

Q. Now, where was she standing at the time that the marshal made these two shots that she has been talking about?

A. She was in the house.

Q. Whereabouts in the house?

A. When the first shot fired she was near the door, and when she saw the second shot she had started out around to the side room.

Q. Did she see him when he fired the second shot?

A. Yes, sir.

Q. After the second shot what did she do?

A. She says she went around to the side room, was going to go away, and this marshal came around to the side room door.

Q. How did she get from the front room, where she has been talking about she was, to the side room?

A. Just walked out there; went there.

Q. Tell her to tell how she got from the front room to the sid' room door; whether she went around the house or through the house.

A. She went out through the side room.

Q. She went through the house, did she?

A. Yes, sir.

Q. When the marshal came whereabouts at the side room was she when she met the marshal—when he came around?

A. She was at the door.

Q. What did the marshal do?

A. She says "he told me to get out of the way, to go away."

Q. The marshal told her to get out of the way?

A. Yes, sir.

Q. Did he have any weapon with him, any pistol or anything of the kind?

A. Yes, sir; he had a pistol.

Q. How did he have it when he met her at the side room door?

A. He had it in his hands.

Q. He had a pistol when he met her at the side room door, and had it in his hand?

A. Yes, sir.

264 Q. Is that the time that he told her to get away?

A. Yes, sir.

Q. What did the marshal do then?
A. She says she don't know; she got away then.
Q. Ask her if he went into the side room door.
A. She says she reckons so.
Q. What did she do?
A. She went away.
Q. Where did she go?
A. Towards the spring.
Q. Did she run?
A. Yes, sir.
Q. How far is the spring from the house?
A. It is something over a quarter of a mile.
Q. After she left the house did she hear any more shooting?
A. Yes, sir.
Q. Could she tell how much shooting?
A. No, sir.
Q. How long did she stay there at the spring?
A. Until night.
Q. How late in the night?
A. She says a little after dark.
Q. What did she do then?
A. Nothing.
Q. And if she went anywhere after that where did she go to?
A. She went to her mother's the next day, she said.
Q. That evening after she had been to the spring—she does not understand me—wher' did she go to *to* that night after she had been to the spring?
A. Went back to the house.
Q. Who did she find at the house?
A. No, one.
Q. Did she see Sam that night?
A. Yes, sir; he was there.
Q. Was he there when she first got there, or did he come afterwards?
A. He was there when she got there.
Q. Where did she and Sam stay that night?
A. Near the house under some apple trees.
Q. Was there anybody come there that night?
A. Yes, sir.
265 Q. Does she know who it was?
A. No, sir.
Q. What did they do when they come?
A. They didn't do anything.
Q. Did they holler or make a noise?
A. Yes, sir.
Q. Did they call out for anybody?
A. No, sir.
Q. Could she tell what kind of a noise they made?
A. No, sir; she could not tell.
Q. She says at that time she liveed at Big Aleck's; where was Aleck at that time, does she know?
A. He wasn't at home; he had gone somewhere, she reckoned.
Q. Ask her if there was anybody else staid there?

A. No, sir.
Q. Ask her if there was another man staid there at another house?
A. Yes, sir; Jim.
Q. Where was Jim at that time? She has told that Aleek was not there; where was Jim?
A. He was on Grand River, somewhere.
Q. Does she know what he went for?
A. After some fish.
Q. Now, what time did Jim come back?
A. He come back the next night.
Q. Ask her when he came back; what night it was.
A. She says that he came back the next night.
Q. Ask her if she means the night after the shooting or the next night after that. Ask her if he came back the same night that they staid under the apple tree or the next night.
A. That night they staid there.
Q. That night they staid under the tree?
A. Yes, sir.
Q. Could she tel', or did she know, the time of night he got back?
A. A little after dark.
Q. Did she see Jim the next morning?
A. Yes, sir.
266 Q. Where did she see Jim at?
A. At that house.
Q. At Jim's house or at Aleek's house?
A. At Jim's house.
Q. When she seen Jim there the next morning was there anybody else there?
A. No, sir.
Q. What did she and Jim do the next morning?
Didn't do anything.
Q. State whether or not she got breakfast for Jim the next morning?
A. Yes, sir; she got breakfast for Jim.
Q. Was Sam there the next morning, or not? Did Sam get breakfast there?
A. Yes, sir.
Q. After breakfast what did she do?
A. She went to her mother's.
Q. At the time she started to go to her mother's had Aleek got back?
A. Yes, sir; he had come back.
Q. Could she tell what time of day it was she started to her mother's?
A. She says she guesses it was about 10 o'clock.
Q. When did she get back from her mother's?
A. The next day.
Q. What time of day?
A. About 12, or nearly.
Q. The next day when she got back from her mother's, did she see any men hunting around there for a dead man, or asking any questions about it?
A. Yes, sir; she saw them.
Q. What time of day were the men there?
A. About 2:00 o'clock that evening.

Q. Did she know any of the men that came there to hunt for the marshal?

A. No, sir.

Q. Ask her if Tom Shade came there.

A. Yes, sir.

Q. When did Tom come there?

A. On Thursday evening.

Q. The same day that she had come from her mother's?

A. Yes, sir.

267 Q. What time of day did Tom come in the evening; how did he come?

A. He was riding—came horseback.

Q. What did he do when he came; did he ask for anybody?

The COURT. I think you hadn't better suggest anything; just ask what he did.

Q. Ask her what he did.

A. He asked for Sam.

Q. At that time where was Sam; does she know?

A. He was away somewhere, she reckons.

Q. How long did Tom Shade stay ther'?

A. Just a little while.

Q. What did he do then?

A. Just went off.

Q. Did he do anything else except to inquire for Sam?

A. That is all.

Q. Did he get anything there or not that she knows?

A. No, sir.

Q. Was Tom Shade there at any other time?

A. No, sir.

Q. That is Thursday she is speaking of?

A. Yes, sir.

Q. How long did she stay there then?

A. She went back to her mother's again on Friday morning.

Q. Was she back there any more to Aleck's?

A. No, sir.

Q. Or was Tom Shade there any more except this one time she speaks of?

A. No, sir.

Q. That is al' she saw Tom Shade?

A. Yes, sir.

Q. Now tell her we want to go back and ask her if after she run away from there then at the time of the shooting; ask her if she saw anything more of the marshal after that.

A. She says she didnt see him any more.

Q. When she came back that night, as she has said, and staid
268 there until morning, got breakfast next morning for Jim, ask her if she was out about the yard, and about the place there did she see any man there alive or dead or anyway; was the marshal there, dead or alive.

A. She says she didn't see him.

Q. Was she out about the place and about the yard there?

A. No, sir.

Q. Ask her if there was another man staid there at another house?

A. Yes, sir; Jim.

Q. Where was Jim at that time? She has told that Aleck was not there; where was Jim?

A. He was on Grand River, somewhere.

Q. Does she know what he went for?

A. After some fish.

Q. Now, what time did Jim come back?

A. He come back the next night.

Q. Ask her when he came back; what night it was.

A. She says that he came back the next night.

Q. Ask her if she means the night after the shooting or the next night after that. Ask her if he came back the same night that they staid under the apple tree or the next night.

A. That night they staid there.

Q. That night they staid under the tree?

A. Yes, sir.

Q. Could she tel', or did she know, the time of night he got back?

A. A little after dark.

Q. Did she see Jim the next morning?

A. Yes, sir.

266 Q. Where did she see Jim at?

A. At that house.

Q. At Jim's house or at Aleck's house?

A. At Jim's house.

Q. When she seen Jim there the next morning was there anybody else there?

A. No, sir.

Q. What did she and Jim do the next morning?

Didn't do anything.

Q. State whether or not she got breakfast for Jim the next morning?

A. Yes, sir; she got breakfast for Jim.

Q. Was Sam there the next morning, or not? Did Sam get breakfast there?

A. Yes, sir.

Q. After breakfast what did she do?

A. She went to her mother's.

Q. At the time she started to go to her mother's had Aleck got back?

A. Yes, sir; he had come back.

Q. Could she tell what time of day it was she started to her mother's?

A. She says she guesses it was about 10 o'clock.

Q. When did she get back from her mother's?

A. The next day.

Q. What time of day?

A. About 12, or nearly.

Q. The next day when she got back from her mother's, did she see any men hunting around there for a dead man, or asking any questions about it?

A. Yes, sir; she saw them.

Q. What time of day were the men there?

A. About 2:00 o'clock that evening.

Q. Did she know any of the men that came there to hunt for the marshal?

A. No, sir.

Q. Ask her if Tom Shade came there.

A. Yes, sir.

Q. When did Tom come there?

A. On Thursday evening.

Q. The same day that she had come from her mother's?

A. Yes, sir.

267 Q. What time of day did Tom come in the evening; how did he come?

A. He was riding—came horseback.

Q. What did he do when he came; did he ask for anybody?

The COURT. I think you hadn't better suggest anything; just ask what he did.

Q. Ask her what he did.

A. He asked for Sam.

Q. At that time where was Sam; does she know?

A. He was away somewhere, she reckons.

Q. How long did Tom Shade stay ther'?

A. Just a little while.

Q. What did he do then?

A. Just went off.

Q. Did he do anything else except to inquire for Sam?

A. That is all.

Q. Did he get anything there or not that she knows?

A. No, sir.

Q. Was Tom Shade there at any other time?

A. No, sir.

Q. That is Thursday she is speaking of?

A. Yes, sir.

Q. How long did she stay there then?

A. She went back to her mother's again on Friday morning.

Q. Was she back there any more to Aleck's?

A. No, sir.

Q. Or was Tom Shade there any more except this one time she speaks of?

A. No, sir.

Q. That is al' she saw Tom Shade?

A. Yes, sir.

Q. Now tell her we want to go back and ask her if after she run away from there then at the time of the shooting; ask her if she saw anything more of the marshal after that.

A. She says she didnt see him any more.

268 Q. When she came back that night, as she has said, and staid there until morning, got breakfast next morning for Jim, ask her if she was out about the yard, and about the place there did she see any man there alive or dead or anyway; was the marshal there, dead or alive.

A. She says she didn't see him.

Q. Was she out about the place and about the yard there?

A. Yes, sir; she went there.

Q. Ask her if there was any wagon hitched up there next morning by anybody—on Sunday morning; any horses hitched up the morning she got breakfast for Jim; if there was any wagon or team hitched up there by anybody.

A. No, sir.

Q. Up to the time that she went away to go to her mother's was the wagon hitched up, or the team hitched up?

A. No, sir.

Q. She didn't see any horses hitched up?

A. No, sir.

Q. When she went away from there that morning where was the wagom at?

A. Near the tree.

Q. Standing near that tree?

A. Yes, sir.

Q. Tell her to state whether or not it was like it was the day before when Sam had it to haul rails, or whatever it was.

A. Yes, sir.

Q. It was just in the same condition?

A. Yes, sir.

Q. Ask her if she ever got any letter from Sam Hickory after this shooting?

A. No, sir.

Q. Tell her to look at this letter [handing witness heretofore introduced in evidence by the district attorney]. Did you ever get this letter?

A. She says she did not.

Cross-examination:

The DISTRICT ATTORNEY. Ask her to read the letter to you?

269 A. She says it is: "October 15th, 1891. Ollie, I write you a few lines," or "I write you this," and "You must never tell how this is. Just say that I was the only one——"

Q. Does she not use Tom Shade's name?

A. I don't unde'stand her good enough.

Q. Tell her to commence again.

A. "Ollie: I write you a f'w lines. You must never disclose this, how this is, what Tom Shade done. Just say that I was the only one that did this, and you must never tell anybody about him killing the horse, and all that he did. I tell you that you must not. That is all. Sam."

Q. Ask her if she remembers of being down in my office, and reading that letter to me?

A. Yes, sir.

Q. Ask her what made her tell me that she got that from Sam, and that it was in Sam's handwriting.

Mr. BARNES (of counsel for defense). Ask her first if she did.

The DISTRICT ATTORNEY. Ask her what made her tell me that? What made her tell me that she got it from Sam, and it was in Sam's handwriting, and that Price Cochran got it from her mother?

Mr. BARNES (of counsel for defense). I think the district attorney ought to be required to put the question a little different from that; he ought to ask the witness first if she did tell him that.

The DISTRICT ATTORNEY. Ask her if she didn't tell me what I have stated.

A. She says she don't remember.

Q. She remembers being in my office, does she not?

A. Yes, sir.

Q. She remembers reading this letter to me, does she not?

270 That is, she read it to you and you interpreted it to me.

A. Yes, sir.

Q. She reme'bers that she told me that she got that from Sam, does she not, through you?

A. No, sir.

Q. She does not remember that. Ask her *ff* she swears that she did not tell me that when I was talking to her through you.

A. She says she don't remember of ever stating that to you.

Q. Does she not remember of stating that it was in Sam's handwriting? If I didn't ask her the question, whether it was in Sam's handwriting, and she said that it was, and that Sam wrote the letter?

A. She says that she don't remember of having said that; she remembers of reading the letter.

Q. Tell her she must remember. She must think about it and remember whether she did or not; she knows very well whether she did or not; tell her she must tell.

A. She says she does not recollect of saying that.

Q. Does she remember of saying that Price Cochran got it from her mother?

A. No, sir.

Q. She does not remember of telling me that Sam wrot' the letter to her?

A. No, sir.

Q. Tell her if she would remember it then she would recollect it now; she wouldn't forget it. It was only two or three days ago that she was talking to me. Tell her to tell the truth about it.

A. She says she don't recollect.

Q. She is here as a Government witness, is she not?

A. She says she reckons so.

Q. Ask her who gave her this letter; how she got it. Who did Sam send it to her by?

A. She don't know.

271 Q. What is the reason she don't know?

A. That was the first time she ever saw it when I read it to her the other day.

Q. Tell her I want to have her to say yes or no to that question of mine as to whether she told me that Sam wrote that letter to her. I don't want her to fall ba'k on her poor recollection.

A. She says just the same thing over; she says she don't recollect; she does not remember.

Q. She wouldn't have told me that if she hadn't got it from Sam, would she? She wouldn't have told a story about it, would she?

A. She says that Sam's name was signed to it, the one that she read.

Q. Sam's handwriting, and his name?

A. She guesses so.

Q. Ask her if it is not in his handwriting. Tell her to look at it and see. Ask her if she didn't tell me it was in Sam's handwriting when she was down below in my office?

A. She says now it is his handwriting, but she does not answer the question.

Q. She says it is his handwriting?

A. Yes, sir.

Q. She told me downstairs it was in Sam's handwriting, did she not?

A. Yes, sir.

The COURT. She says she did?

A. Yes, sir.

The DISTRICT ATTORNEY. She wouldn't have told me a story about it. It is in his handwriting, is it not—in Sam's?

A. Yes, si'.

Q. The whole letter?

A. Yes, sir.

Q. She writes herself, does she not?

A. Yes, sir.

Q. She has had a great many letters from Sam at different times, hasn't she?

A. She never did get any from him.

Q. She never got any? And she says that is Sam's handwriting;
272 that she knows that it is Sam's handwriting, does she?

A. Yes, sir.

Q. She admits she told me that that letter was in Sam's handwriting, does she not?

A. Yes, sir.

Q. Tell her that she sees that I am right about it; that my recollection is right about her telling me it *s*was in Sam's *had*nwriting. Now, tell her to tell me if she does not recollect that she told me that Sam wrote that letter, and that she gave it to her mother, or her mother got it from her; if she does not remember that?

A. No, sir.

Q. She won't own up to that, will s'e?

A. No, sir; she *o*does not know whether she ever said that or not; she does not remember.

Q. Her mother did get it, didn't she?

A. She says she don't know who got it.

Q. She saw it before she came here?

A. No, sir.

Q. How does she know it is in Sam's handwriting?

A. From the signature of it.

Q. From its general appearance?

A. Just from the name on it.

Q. The name is in his handwriting, is it?

A. Yes, sir.

Q. What did she tell me for that th*r* whole letter was in his handwriting for? Was she telling the truth when she told me that the whole letter was in Sam's handwriting?

A. She says again it is all his.

Q. She repeats the whole thing is his?

A. Yes, sir.

Q. Then, if the name wasn't to it she would know it was in his handwriting, would she?

A. Yes, sir.

Q. She answers that if th' name wasn't to it that she would know it was in Sam's handwriting from the handwriting?

A. Yes, sir.

273 Q. Does she know whether the deputy marshal was killed or not?

A. She says all she saw of him was when he came to the house.

Q. She don't know that he was killed, then?

A. No, sir; she didn't see him after he was killed.

Q. Who took him away from there in a wagon and threw him down in a gulch?

A. She don't know.

Q. When was he taken away, at what time?

A. She does not know that.

Q. She saw the blood there in the house, didn't she, and the bullet holes?

A. Yes, sir; she saw the blood in the house.

Q. When was that?

A. The next morning.

Q. What was she doing over there next morning?

A. She went in the house.

Q. Did she get breakfast in that house?

A. No, sir.

Q. What?

A. She says she saw that blood when she started to her mother's.

Q. Was that the day of the killing or the next day?

A. The next day.

Q. What time did she start for her mother's?

A. About 10:00 o'clock.

Q. Where was the deputy marshal then?

A. She don't know; she never saw him.

Q. Where was his horse?

A. She don't know; she didn't see the horse.

Q. Well, then, the horse must have been killed and the deputy marshal taken away that night, the first night, was it?

A. She says she guesses so.

Q. Who done it?

A. She don't know.

274 Q. She ought to know something about it; she was there. When was it that Tom Shade came?

A. On Thursday.

Q. How does she know it was Thursday?

A. For this reason: She was over to her mother's and came back the next day, and the next day was Thursday, and that is the evening he came.

Q. How far does her mother live from there?

A. She says she guesses it must be about 6 miles.

Q. If the marshal shot at Sam so many times he must have hit Sam. Where did he hit him?

A. She says she don't know.

Q. Ask her if Sam had a scratch on him.

A. She says she don't know.

Q. She ought to know; she slept with him that night; she ought to know whether he was wounded or not.

A. She says she didn't see anything.

Q. Did Sam complain of being wounded?

A. No, sir; he never said.

Q. She slept with him, didn't she, that night?

A. Yes, sir.

Q. Under the apple tree?

A. Yes, sir.

Q. How long had she been sleeping with Sam, living with him?

A. For sometime.

Q. A year?

A. About five months.

Q. Had she been married to him?

A. No, sir.

Q. Just took up with him?

A. Yes, sir.

Q. She is sleeping with another fellow now; living with another fellow?

A. Yes, sir.

Q. The same way?

A. Yes, sir.

Q. Who is she living with now?

A. With Williams.

Q. Ben Williams?

A. Thomas Williams.

275 Q. He is an Indian, is he not?

A. Yes, sir.

Q. She is not married to him, is she?

A. No, sir.

Q. Has she any children?

A. No, sir.

Q. She says that Aleck was away from home at that time and did not get back until the next day?

A. Yes sir.

Q. Ask her if she ever lived with anybody before she went to live with Sam?

A. No, sir.

Q. She commenced with Sam, did she?

A. Yes, sir.

Q. Jim got home that night, did he?

A. Yes, sir.

Q. What time in the night?

A. Sometime after dark.

Q. How long after dark?

A. She says it was rather late.

Q. Much after dark?

A. Yes, sir.

Q. Jim got home on the night of the killing; was it just a little after dark?

A. No, sir; tolerable late, she says.

Q. Does she know the time—8 or 9 or 10 o'clock?

A. She guesses it must have been about 9:00 o'clock.

Q. Did she get supper for him?

A. No, sir.

Q. Did she see him when he came home?

A. No, sir; she didn't see him?

Q. How did she know that he got home?

A. She says she knows, though, that he got home?

Q. How does she know?

A. He came back to the house that he lived in.

Q. How does she know if she was out there under the apple tree and didn't see him—how does she know it?

A. She says she knows that he got back home by when he put the bell on the horse.

Q. Did she see him put the bell on the horse?

A. By the sound, she says she knew it.

276 Q. Did she see him put the bell on the horse?

A. No, sir.

Q. Did she hear him?

A. Yes, sir.

Q. Why didn't she go up to the house to him?

A. She says she didn't.

Q. What did they sleep out there under the apple trees for?

A. She says it wasn't far from the house.

Q. What did they sleep under the apple tree for; why didn't they sleep in the house that night?

A. "Just because," is the way she says it.

Q. Can she give no better reason than "because?" Were they not afraid to sleep out under the apple tree?

A. No, sir.

Q. What did they go out there for?

A. She says the same thing, "Because."

Q. Ask her if she has any other reason than "because?"

A. She says she don't know; they just went out.

Q. Ask her if Sam took his gun out there with him?

A. No, sir.

Q. Where did Sam leave his gun?

A. She says she don't know.

Q. Ask her if she does not know that Sam took that gun out there? He wouldn't go out there and stay there without a gun, with'ut having a gun, after having that fight, she knows that. He lived at the house, didn't he?

A. Yes, sir.

Q. Where did Sam go the next day?

A. She says she guesses he went off somewhere.

Q. Did she ever see him any more?
A. She says she saw him on Thursday again.
Q. Where did she see him?
A. At the house there.
Q. What was he doing there?
A. And not anything.
Q. How long did he stay there?
A. Just a short time.
Q. A few minutes?
A. She says she supposes so; he didn't stay there very long.
Q. Then where did he go?
277 A. She says she don't know which way he went.
Q. Did she ever see him any more after that?
A. No, sir.
Q. I suppose he wrote to her some, of course?
A. She says she guesses so, but she never did see any letter from him; never did get any letters from him.
Q. She says she guesses so?
A. Yes, sir.
Q. What makes her guess so?
A. She says she never did see any of his letters that he has written to her.
Q. Why does she say she guesses he did?
A. She says she did never get any of the letters from him, see any of them.
Q. That is not answering the question; she says she guesses that Sam wrote to her; what makes her guess it?
A. She says just the same thing over.
Q. Did Sam write to her mother?
A. No, sir; not that she knows of.
Q. She says she don't know anything about the horse being killed; she does not know anything about the marshal being taken away from there in a wagon?
A. No, sir.
Q. Where was Big Aleck when Shade came there on Thursday?
A. She says she guesses he was around there somewhere.
Q. Does she know that?
A. She says he was there, but 'e had gone off; hadn't been gone very long.
Q. Was he around there or was he gone off somewhere?
A. He was gone away.
Q. Where was Jim?
A. She reckons he was at the house, at home.
Q. Did Tom go up to the other house?
A. Yes, sir.
Q. So Jim saw Tom, did he?
278 A. She says she supposes so; he was down at home.
Q. Ask her if she was up at this old house when some of those men were there looking for the body, in there by herself Thursday morning early.
A. She says she did not get home until about 12 on Thursday.

Q. Did she see them there on Thursday?
A. Yes, sir.
Q. She was in there by herself?
A. Yes, sir.
Q. She was in the house by herself on Thursday, and she got home about 12 o'clock?
A. Yes, sir.
Q. Is that the day that the men were there and found the body?
A. No, sir.
Q. They didn't find the body until the next day, did they?
A. They didn't stay there long, she says.
Q. They didn't find the body until the next day, did they?
A. She says she wasn't at 'ome when the body was found; she went off again Friday morning.
Q. They didn't find the body on Thursday, because she was there Thursday, wasn't she?
A. No, sir; they didn't stay there long.
Q. She left the next day; they didn't find the body while she was there, did they?
A. No, sir.
Q. She left on Friday at what time?
A. Friday morning.
Q. Then when she saw Shade there, whatever time it may have been, it was before the body was found?
A. Yes, sir; he hadn't been found.
Q. She saw Shade there the day before she went over to her mother's, did she not?
A. Yes, sir.
Q. What time in the day?
It was on Thurdday evening.
279 Q. What time?
A. Some time between three and four o'clock that evening.
Q. Ask her if she does not know that upon that evening there was 20 or 30 men there looking for the body—or some 8 or 10 men; or was it the next day?
A. She says she saw just a few.
Q. On Thursday?
A. Yes, sir.
Q. At the same time that Tom was there?
A. Yes, sir.
Q. I suppose they saw Tom, too?
A. No, sir; they didn't see him.
Q. Why?
A. They had left when he come.
Q. Tom didn't come until after they left; is that it?
A. Yes, sir.
Q. Did she learn where Tom was staying at that time?
A. No, sir.
Q. Was it not Wednesday that she saw Tom? Didn't she see Tom before she saw these men there?
A. No, sir.

280 ALECK STOCK, having been duly sworn upon behalf of the defense, was examined by Mr. J. Warren Reed through an interpreter, and testified as follows, to wit:

Question. Ask him what his name is.

Answer. Aleck Stock.

Q. Ask him if he is the man they call Big Aleck?

A. Yes, sir.

Q. Ask him where he lives.

A. In Tahlequah district, on Fourteen Mile Creek.

Q. Ask him if he knows Sam Hickory here.

A. Yes, sir.

Q. Ask him if he knows when it was said that a marshal was shot up there.

A. Yes sir.

Q. Ask him if he and Sam lived together there.

A. Yes, sir; he was staying with him there.

Q. Who owned the place—whose house was it?

A. It was his.

Q. Ask him if the teams and wagins, and so on, belonged to him.

A. Yes, sir.

Q. Did anybody else live about there close to him?

A. He says that Jim Squirrel lives close there.

Q. Did he live in the house by himself?

A. Yes, sir.

Q. All in a house to himself?

A. Yes, sir.

Q. Did Jim Squirrel have any family?

A. No, sir.

Q. Ask him where he was the day it was said that the marshal was killed.

A. He says he was gone; he hadn't been gone very long until the marshal came.

Q. What time of day did he leave?

A. About 1:00 o'clock in the evening, somewhere near that time.

Q What was Sam Hickory doing when he left?

281 A. He was out with the wagon in the road; he was going to build a stable there, and he was going to haul some posts.

Q. Working with the timber?

A. Yes, sir.

Q. How many horses in the team?

A. Just two.

Q. What kind of a vehicle did he have?

A. He had a wagon.

Q. What day was that; does he know?

A. On Tuesday.

Q. Does he know the day of the month it was in?

A. It was the 22nd of September.

Q. Tell him to tell where he went?

A. He came out to see a widow, about 6 miles this side.

Q. He was going to see a widow, was he?

A. Yes, sir; Brown's widow.

Q. How was he going, foot or horseback?

A. He says he walked; he told Sam as he was going to use the team he would walk.

Q. When did he get back from the widow's?

A. On Wednesday.

Q. The next day?

A. Yes, sir.

Q. What time of day did he get back?

A. He says it must have been about 10 or 11; somewhere along there.

Q. Where did he first go to when he came back?

A. He came back to his house, and there wasn't anyone there then.

Q. Where did he go then?

A. He just opened the door and went in and saw what had been done.

Q. Where else did he go, and did he find anybody else around there?

A. He says he staid around there awhile, and then he went down to see if Jim had got back.

Q. Did he find Jim?

A. Yes, sir; he was at home.

Q. Jim was at his house?

A. Yes, sir.

Q. Who else did he see there?

A. He asked him when he got back.

Q. What did he tell him?

A. He said he got back last night.

282 Q. Did he see anybody else there, or did anybody come there?

A. No, sir; he didn't see anybody else there.

Q. Nobody come there?

A. No, sir.

Q. When did he see the woman, Ollie?

A. Thursday evening.

Q. The next day?

A. Yes, sir.

Q. When he got there he says there was nobody there but Jim; he says that was on Wednesday, 10 or 11 o'clock; is that right?

A. Yes, sir.

Q. What did he observe abo' this house when he got there?

A. He says he didn't see anything—didn't observe anything, he says.

Q. Did he look around his house?

A. Yes, sir.

Q. What did he see there?

A. He saw the bullet holes.

Q. Did he see some blood there?

A. No, sir; he says he didn't see any; he says that he can not see very good.

Q. Ask him how old he is?

A. He says he is 76 years old and four months and over.

Q. Did he see his wagon?

A. Yes, sir; it was there.

Q. Where was the wagon?

A. Out in that direction; east of the house.

Q. What condition was it in?

A. He did not examine it.

Q. Tel' him to state whether or not it was in the same condition it was when he left when Sam was there using it or not?

A. Yes, sir; from what he could see it was just the same.

Q. Where was the horses then?

A. One of them was near about there, and the other had gone off somewhere on the range.

Q. How many horses belonged there?

A. Just two belonged there.

Q. Did Jim have a horse?

A. Yes, sir; he had one.

Q. Jim had a horse and he had two, and these are the only horses that belonged there, is it?

A. Yes, sir.

Q. One he saw there when he came home, and the other had
283 gone off?

A. He could hear the bell of the one that was near around there, he said.

Q. Did he see Sam Hickory when he got home?

A. No, sir; he did not see him for some time, until Jim told him he was in his house.

Q. When was that?

A. He says it was about 10 or 11, somewhere.

Q. What day was it that he seen Sam first after he came back?

A. On Wednesday.

Q. How long had he been back when he seen Sam?

A. Just a short time.

Q. He had gone in his house now when he first came back?

A. Yes, sir.

Q. Then he saw Sam there?

A. He says he didn't see him until Jim told him.

Q. Could he tell how long he had been home before he saw Sam?

A. He says it wasn't an hour.

Q. Ask him if he saw Tom Shade there that week.

A. No, sir; he didn't see him.

Q. Didn't see him there?

A. No, sir.

Q. Was he away from home any more that week after he had made the trip up to the widow's and back?

A. No, sir.

Q. Was Jim away from home that week?

A. No, sir; he wasn't gone.

Q. Staid there?

A. Yes, sir.

Q. How close are their houses together?

A. About 130 yards apart.

Q. Did anybody come there hunting for the marshal?

A. Yes, sir; on Thursday he said they came.

Q. Was there anybody came before Thursday? If there was, let him state it.

A. No, sir; there was nobody come.

Q. Nobody come and asked any questions?

A. No, sir.

284 Q. Then who came on Thursday?

A. There was a good many, he said.

Q. What time of day; does he recollect?

A. It must have been about 9 or 10 o'clock; between 9 and 10, somewhere along there.

Q. Does he say that several were there on Thursday?

A. Yes, sir.

Q. Ask him if he heard anybody there on Wednesday night riding around.

A. No, sir.

Q. With respect to the time that these people came there to hunt for the man, tell him to state whether or not the woman was there then, whether she had got back or not, Ollie.

A. He says he didn't see her until after these people were there; she was there, though, when they came, but he didn't see her.

Q. Where was she at?

A. She was over at Jim's.

Q. Was that Thursday, now, do we understand?

A. Yes, sir.

Q. Ask him if on Wednesday, when he came back there, if he seen the dead man, or the crippled man, or any kind of a man?

A. No, sir; he said he didn't see anybody.

Q. Was he about the place, walk about there, and look about?

A. Yes, sir; went around the place.

Q. On Wednesday, was his wagon hitched up that day; his team and wagon?

A. No, sir.

Q. Was it hitched up the next day, any time Thursday?

A. No, sir.

Q. Either Thursday or Wednesday did anybody hitch up the team to the wagon, and he didn't see any dead man or crippled man or anything of that kind around the place.

A. No, sir.

Q. Ask him if he saw a wounded horse there.

A. No, sir; he did not see it.

285 Q. Ask him if Sam Hickory, here, ever *ever* come to him, or sent him for Tom Shade, or sent any word by him to Tom Shade, that week?

A. No, sir.

Q. Ask him if he knows Tom Gallcatcher?

A. No; he didn't get acquainted with him after until he was arrested.

Q. When he was arrested he was taken to the town of Tahlequah?

A. Yes, sir.

Q. Ask him if he wasn't chained there in the camp; and if so, who he was chained to?

A. He says when they taken him out to the camp, out a little *peice* from there, he said they told him that Dave wanted to see him, and after he got there, him and Tom Shade was chained together.

Q. They chained him and Tom, here, together?

A. Yes, sir.
Q. What did they do with him then?
A. They moved them out then to the edge of the prairie, there.
Q. Does he know how long he was chained to Tom Shade, here?
A. Until the next day.
Q. Was he just chained one night, does he mean?
A. Yes, sir.
Q. Who guarded him that night; does he know?
A. The marshals and Tom Gallcatcher.
Q. Was that the first night that he was taken to that camp—the night that Tom Gallcatcher guarded him?
A. Yes, sir.
Q. Was that the only night that he was chained to Tom Shade?
A. Yes, sir; that is the only time.
Q. Ask him if he slept any that night.
A. He said he didn't sleep very well.
Q. Ask him if he slept any?
A. Yes, sir; some.
286 Q. What time in the night did he sleep.
A. He says it must have been after midnight some time.
Q. Ask him if he heard Tom Gallcatcher and Tom Shade, here, talking that night?
A. No, sir; only that they were talking and going on; joking.
Q. Is that the kind of talk they had?
A. Yes, sir; he says they were talking about the times they had been together, and all about that.
Q. Ask him now, there that night, if Tom Shade made any statement to Gallcatcher in his hearing about Sam Hickory having anything to do with the killing of that marshal; whether he told him that Shade had gone there and knocked the marshal in the head with an axe?
A. No, sir; he didn't say anything of the kind.
Q. He heard nothing of that kind there?
A. No, sir.
Q. Did he hear him tell Gallcatcher about having anything to do with the killing of the marshal at all?
A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

He went over to see the widow, did he?
A. He went over there; yes, sir.
Q. Did he stay all night with her?
A. No, sir; he staid all night about a mile from there.
Q. Why didn't he stay with the widow?
A. He says that the widow was sick, and he went there to see her.
Q. He went there to give her some Indian doctor stuff?
A. Yes, sir.
287 Q. He went there to give her some roots?
A. Yes, sir.
Q. Root tea? He is a kind of a root doctor, is he not?
A. Yes, sir.
Q. Did he hear any shooting when he was riding off?
A. No, sir.

Q. He did not go over on White River fishing, did he?

A. No, sir.

Q. Ask him if Jim went over on White River fishing?

A. Yes, sir; he said he went over on Grand River.

Q. Ask him how it happened that they all were away from there when the man was killed at their house?

A. He says it just happened that way; the other man went after some fish and he was over to this other place.

Q. Tell him I want to know who hauled that body away from there and threw it down in that gulch.

A. He says he don't know; that he didn't even see the dead body. He says he don't know who put it there.

Q. Tell him there was a horse killed, in about 250 yards of the house; ask him what is the reason he didn't find that horse?

A. He says he could not get around there much; he was sick.

Q. Who killed the horse?

A. He does not know who killed the horse.

Q. He does not know who killed the horse or who killed the man there, does he?

A. No, sir.

Q. Never heard anything about it, did he?

A. No, sir.

Q. Never heard who did it?

A. No, sir.

Q. Did he ever talk to old Jim about it?

A. No, sir.

288 Q. Why didn't he talk to old Jim about it, his nearest neighbor?

A. Of course we had nothing to talk about, he says. They didn't know anything about it.

Q. Had nothing to talk about?

A. That is, about this, he says. He didn't know anything about this.

Q. Did Jim know? Jim was home there before he was; it would be a very proper thing for him to ask Jim.

A. He says, no, sir; he didn't know anything about it.

Q. He never even saw any blood, did he?

A. No, sir; he says he can't see very good.

Q. Ask him who it was that turned the plank upside down so as to hide the blood in his back room?

A. He says that the men came there, and he told him that he was sick and not able to hunt the body or help to.

Q. He got sick all of a sudden; when was he taken sick?

A. He has been that way for some time.

Q. He wasn't so sick but he walked down to the widow's the day before?

A. He says he got worse when he got back.

Q. He walked home from the widow's the day before that, when he was taken so sick that he could not go around there and show the men what there was to be seen?

A. He says he was real tired when he came there, and he just gave them permission to look for the body all around there.

Q. What made him tired?

A. Yes, sir.
Q. What did they do with him then?
A. They moved them out then to the edge of the prairie, there.
Q. Does he know how long he was chained to Tom Shade, here?
A. Until the next day.
Q. Was he just chained one night, does he mean?
A. Yes, sir.
Q. Who guarded him that night; does he know?
A. The marshals and Tom Gallcatcher.
Q. Was that the first night that he was taken to that camp—the night that Tom Gallcatcher guarded him?
A. Yes, sir.
Q. Was that the only night that he was chained to Tom Shade?
A. Yes, sir; that is the only time.
Q. Ask him if he slept any that night.
A. He said he didn't sleep very well.
Q. Ask him if he slept any?
A. Yes, sir; some.
286 Q. What time in the night did he sleep.
A. He says it must have been after midnight some time.
Q. Ask him if he heard Tom Gallcatcher and Tom Shade, here, talking that night?
A. No, sir; only that they were talking and going on; joking.
Q. Is that the kind of talk they had?
A. Yes, sir; he says they were talking about the times they had been together, and all about that.
Q. Ask him now, there that night, if Tom Shade made any statement to Gallcatcher in his hearing about Sam Hickory having anything to do with the killing of that marshal; whether he told him that Shade had gone there and knocked the marshal in the head with an axe?
A. No, sir; he didn't say anything of the kind.
Q. He heard nothing of that kind there?
A. No, sir.
Q. Did he hear him tell Gallcatcher about having anything to do with the killing of the marshal at all?
A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

He went over to see the widow, did he?
A. He went over there; yes, sir.
Q. Did he stay all night with her?
A. No, sir; he staid all night about a mile from there.
Q. Why didn't he stay with the widow?
A. He says that the widow was sick, and he went there to see her.
Q. He went there to give her some Indian doctor stuff?
A. Yes, sir.
287 Q. He went there to give her some roots?
A. Yes, sir.
Q. Root tea? He is a kind of a root doctor, is he not?
A. Yes, sir.
Q. Did he hear any shooting when he was riding off?
A. No, sir.

Q. He did not go over on White River fishing, did he?

A. No, sir.

Q. Ask him if Jim went over on White River fishing?

A. Yes, sir; he said he went over on Grand River.

Q. Ask him how it happened that they all were away from there when the man was killed at their house?

A. He says it just happened that way; the other man went after some fish and he was over to this other place.

Q. Tell him I want to know who hauled that body away from there and threw it down in that gulch.

A. He says he don't know; that he didn't even see the dead body. He says he don't know who put it there.

Q. Tell him there was a horse killed, in about 250 yards of the house; ask him what is the reason he didn't find that horse?

A. He says he could not get around there much; he was sick.

Q. Who killed the horse?

A. He does not know who killed the horse.

Q. He does not know who killed the horse or who killed the man there, does he?

A. No, sir.

Q. Never heard anything about it, did he?

A. No, sir.

Q. Never heard who did it?

A. No, sir.

Q. Did he ever talk to old Jim about it?

A. No, sir.

288 Q. Why didn't he talk to old Jim about it, his nearest neighbor?

A. Of course we had nothing to talk about, he says. They didn't know anything about it.

Q. Had nothing to talk about?

A. That is, about this, he says. He didn't know anything about this.

Q. Did Jim know? Jim was home there before he was; it would be a very proper thing for him to ask Jim.

A. He says, no, sir; he didn't know anything about it.

Q. He never even saw any blood, did he?

A. No, sir; he says he can't see very good.

Q. Ask him who it was that turned the plank upside down so as to hide the blood in his back room?

A. He says that the men came there, and he told him that he was sick and not able to hunt the body or help to.

Q. He got sick all of a sudden; when was he taken sick?

A. He has been that way for some time.

Q. He wasn't so sick but he walked down to the widow's the day before?

A. He says he got worse when he got back.

Q. He walked home from the widow's the day before that, when he was taken so sick that he could not go around there and show the men what there was to be seen?

A. He says he was real tired when he came there, and he just gave them permission to look for the body all around there.

Q. What made him tired?

A. He had walking and he was tired and sick from his disease; he says he has a breast complaint; hurt him down here.

Q. That did not keep him from seeing the blood; he said he could see the bullet holes; why could he not see the blood?

289 A. He says he didn't see it; and he says he is telling the truth.

Q. Does he say there was no blood there?

A. He says he never seen any.

Q. Does he say that Tom Shade wasn't there?

A. He says he didn't see him there.

Q. Didn't see the blood or didn't see Tom Shade; did he hear of Tom's being there?

A. He says he didn't hear about Tom being there.

Q. He didn't send anybody off to tell Tom Shade to come there; that Hickory was in trouble?

A. No, sir.

Q. Didn't he go himself?

A. No, sir.

Q. He d'dn't go to see Tom Shade to tell him that Hickory was in trouble?

A. No, sir.

Q. Ask him if he knows where the Blue Springs schoolhouse is.

A. Yes, sir; but he says it is a good peice efrom there.

Q. Ask him if he saw Tom at the Blue Springs schoolhouse.

A. No, sir.

Q. Did he see him there and take a message from there back to Hickory?

A. No, sir; he didn't know anything about it.

Q. When did he next see Tom Shade after this killing; did he see him any more until Tom was taken a prisoner?

A. Yes, sir; he didnt see Tom until he was under arrest.

Q. Ask him if he remembers Mr. Paschal coming out there when he was chained to Tom, and ask the marshals to take the irons off of him—the chains.

A. Yes, sir.

Q. Ask him if he heard what Tom said to Mr. Paschal, on the edge of the prairie, after the chains were taken off of him.

A. He says he does not remember.

290 Q. Ask him if Tom Shade and Mr. Paschal didn't have a talk at that time.

A. No, sir; he didn't notice that.

Q. I want you to ask him if you didn't hear Tom Shade tell Mr. Paschal at that time that he, this witness, came to him, Shade, and told him that Hickory was in trouble.

A. He says no.

Q. And that Shade didn't go to his house to see Hickory, but went to the Blue Springs schoolhouse?

A. No, sir.

Q. When Snell was standing guard of him—the deputy marshal?

A. No, sir; he says he does not remember of having heard anything of that kind.

Q. He says, as a matter of fact, it is not true; that he didn't go to Shade and tell him any such a thing?

A. Yes, sir.

Q. Did he go to Bud Tucker and ask him what to do with the dead man?

A. No, sir.

Q. He does not know anything about this shooting, does he?

A. No, sir.

Q. Ask him if he helped to take that body away.

A. No, sir; he says, "How could I assist in taking the body away when I didn't see the dead body?"

Q. Tell him that is a question he will have to answer himself. I want a direct answer. Did he help take that body away from there?

A. No, sir.

Q. Did he see anybody hitch up the horses and the wagon to take it away with?

A. No, sir; he didn't see anybody.

Q. Did anybody ever tell him how that body was taken away from there?

A. No, sir.

291 Q. Nobody ever told him anything about it?

A. No, sir.

Q. When he first came home from seeing the widow he says that he went into the house; ask him if that is correct.

A. Yes, sir.

Q. Did he go into both rooms?

A. Yes, sir; he went into both rooms.

Q. Was Sam there?

A. Yes, sir; he came in after awhile.

Q. Was he there when he first went there?

A. No, sir; there wasn't anybody there.

Q. How long was it before Sam came?

A. It was a good while afterwards, he said, about 10 or 11 o'clock.

Q. Where did he come from?

A. He never noticed which way he came from.

Q. Was Sam's wife with him?

A. No, sir.

Q. When did Sam's wife first come?

A. On Thursday evening is the time that he saw her.

Q. He first saw her on Thursday evening?

A. Yes, sir.

Q. Was Sam married to this woman, or were they just living together?

A. No, sir; they were not married according to the law.

Q. Just living together, were they?

A. Yes, sir.

Q. At his house?

A. Yes, sir.

Q. Did he, this witness, have any wife or children of his own?

A. No, sir; he didn't.

Q. He never was married, was he?

A. No, sir; he says not.

Q. Did he ever live with a woman?

A. He said he had quit doing that, anything of that kind, when he was a young man.

Q. He was just as good as married when he was a young man,
292 but never was married. How old was he before he quit?

A. He said he quit when he was about 60 years old.

Q. He said he was a young man when he quit.

A. Yes, sir.

Q. He does not know anything more than he has said?

A. No, sir.

Q. Does he know how the blood got on the wagon sheet?

A. No, sir; he says he does not know.

Q. Does he know how the blood got on the wagon?

A. No, sir.

Q. Does he know how the blood got on the floor?

A. He says, "No, sir."

Q. Ask him if he didn't tell Mr. Paschal and Mr. Carey and these people that were there that the blood that was lying out by the door was the blood of some animal, a dog, or a horse, or something?

A. No, sir; he said that Jim told them there was blood out there, and that there was one of his dogs missing, and he supposed that he hurt it. That is what he told him, he said, but then he never seen the blood.

Q. Ask him if he learned there was a dead body out there until it was found?

A. Not until they found the body, he says.

Q. What time did Ollie go back to her mother's?

A. Early Friday morning.

Q. She went back early Friday morning?

A. Yes, sir.

Q. Did she ever come back any more?

A. No, sir.

Q. He says on Wednesday night he was at home; ask him where he slept that night?

A. In his own house.

Q. Where was Jim?

A. At the other house.

Q. Ask him if he slept pretty round on Wednesday night, or was he sick?

A. He was sick.

293 Q. He didn't sleep much, then?

A. No, sir; he never slept very well.

Q. What time did he go to bed?

A. Just good dark.

Q. Was Hickory there?

A. No, sir; hadn't seen him.

Q. Did he hear any men come around Wednesday night and holler at him, ask him to come out, and did he refuse to answer them?

A. The first night that he came home he says in the early part of the night there was two came there.

Q. Who were they?

A. Hogsjooter and Squirrel.

Q. Hogshooter is John Carey; who is the other?

A. Squirrel.
Q. That is Squirrel, is it?
A. He said they are brothers.
Q. Aaron?
A. No, sir.
Q. John Carey and brother?
A. Yes, sir.
Q. Did they come in the house on Wednesday night?
A. No, sir; they just stood on their horses.
Q. Did they talk to him *many*?
A. He says he told them good evening.
Q. Did they ask him anything about this killing or the shooting of Wilson?
A. Yes, sir; he says they asked him—asked him who that was setting down there, and he told them it was Jim.
Q. Jim was in the house, wasn't he?
A. He was at his house, Jim was—at his own house.
Q. Ask him where he next saw Hickory after he saw him there that Wednesday?
A. He says he didn't see him any more after that.
Q. Where did he go?
A. Just around somewhere, he guessed.
Q. Was he on the scout?
A. Yes, sir.
Q. I suppose he took his gun with him?
294 A. Yes, sir; he took it with him.
Q. Did he see him have his gun on Wednesday, his Winchester?
A. He didn't have it.
Q. When did he take it?
A. After awhile, he guesses.
Q. Was it on Wednesday that he took his gun? He never saw him any more, and it must have been then?
A. He says that he had his gun out somewhere and left it, when he came to the house; had it hid somewhere.
Q. Had it under the apple tree?
A. He never saw it; never asked him; out there somewhere, he guesses.
Q. Then, when he came home Wednesday, the gun was not there?
A. No, sir; it wasn't there.
Q. The gun wasn't there, but it was hid out somewhere when he *y*ame on Wednesday? Hickory left Wednesday and he has never seen him since; he has been on the scout ever since, until he was arrested?
A. Yes, sir.
Q. What became of Ollie?
A. She went to her mother's.
Q. She went to her mother's and took up with another fellow after awhile, didn't she, Williams?
A. Yes, sir; at somewhere*s* else, though; not around there, he says.
Q. Went off and then took up with Tom Williams?
A. Yes, sir.

295 JIM SQUIRREL, being called on behalf of the defendant in the above entitled cause, testified as follows:

Mr. REED (through interpreter Walkingstick):

Question. Ask him his name?

Answer. Jim Squirrel.

Q. Ask him if he knows Aleck Stock?

A. Yes, sir.

Q. Is he any kin to Aleck?

A. Yes, sir.

Q. What kin?

A. Brothers.

Q. Where does he live?

A. Close to Aleck's.

Q. Ask him again if he is any blood kin, what we call blood relation, to Aleck?

A. Yes, sir.

Q. How, in what way? Same father and mother, does he mean?

A. Yes, sir; same father and mother.

Q. He lives there close to him?

A. Yes, sir.

Q. Tell him I want him to tell us now where he was the day the marshal was killed; ask him where he was on that day?

A. He says he had gone to Grand River; there was a fish killing on Tuesday.

Q. What time did he start?

A. He said he left Monday morning tolerable early.

Q. He went to Grand River, and said there was a fish killing on Tuesday?

A. Yes, sir.

Q. Was he at the fish killing?

A. Yes, sir.

Q. Did he go home afterwards?

A. He left late, before dark.

Q. He left the fish killing a little before dark and started home?

A. Yes, sir.

296 Q. What day?

A. Tuesday, a little before dark.

Q. Tuesday evening, a little before dark, he left the fish killing. Did he get home that night?

A. Yes, sir.

Q. What time did he get home?

A. About midnight, he says.

Q. Was he riding or walking?

A. He was horseback—riding.

Q. What did he do when he got home?

A. He unsaddled his horse and turned him loose.

Q. When he got home, did he see anything of Aleck's horses?

A. He said he saw one.

Q. Where was it?

A. He says he saw him about half a mile from there.

Q. Where was the other one when he got home?

A. He says he didn't see the other one.

Q. He saw one half a mile before got home. Did he meet the horse?

A. Yes, sir.

Q. Was he on his range where he runs?

A. Yes, sir; he was on his range.

Q. What did he do when he got home?

A. He turned his horse out.

Q. Did he retire—go to bed?

A. Yes, sir; he said he went to bed.

Q. Did he see anybody when he went home that night? Was there anybody about the place?

A. He didn't see anybody.

Q. Who did he see next morning?

A. Just Ollie.

Q. On Wednesday morning he saw Ollie?

A. Yes, sir.

Q. Where was Ollie on Wednesday morning?

A. She got him his breakfast.

297 Q. Whereaboyts—at his house or Aleck's house?

A. At his house.

Q. Did he see Sam Hickory that morning?

A. Yes, sir; he said he saw him for a few minutes; a short time.

Q. That was Wednesday morning?

A. Yes, sir.

Q. Where was Same—at breakfast?

A. After breakfast he went out there.

Q. Did he eat breakfast there?

A. Yes, sir; he ate breakfast there.

Q. What became of Ollie; did she stay there, or go away?

A. She went to her mother's.

Q. What day was it she went to her mother's?

A. Wednesday.

Q. What time of day did she start to her mother's?

A. About nine o'clock.

Q. When did she get back from her mothers's?

A. Early Thursday morning.

Q. She came back Thursday?

A. Yes, sir.

Q. When did Aleck get back?

A. Wednesday evening.

Q. Where was he when he came back; did he see him when he first came back?

A. Yes, sir; he saw him.

Q. Where did he first see him?

A. He came to his house the first he saw him.

Q. Does he know how long he had been home before he came to his house?

A. He didn't stay there very long; just went by to his own house.

Q. Did he stop at his house as he went down, or at his own house?

A. He didn't stop there long at Aleck's own house.

Q. Ask him if he was about him all day Wednesday.
A. Yes, sir.
Q. When he got up in morning and went out, where was the
298 wagon, if he saw the wagon?
A. It was there.
Q. Does he know where the horses were Wednesday morning?
A. No, sir.
Q. On Wednesday was the wagon and team hitched up by anybody?
A. He didn't see that.
Q. Tell him to state whether or not there was a man—or a crippled man—about that place Wednesday at any time during that day, or a wounded man.
A. No, sir; he didn't see any.
Q. Did he hear anybody halloo, hear any noi*a*se, or any groans, anything like that there?
A. No, sir; he didn't hear anything.
Q. On Wednesday, any time that day, ask him if he saw Sam Hickory, or anybody else, haul off a man there.
A. No, sir.
Q. Or any time after he came home on Tuesday night—Wednesday or Thursday forenoon, was a man hauled off by anybody—him or anybody else?
A. No, sir; he don't know that.
Q. Ask him if he saw Tom Shade there at any time that week.
A. No, sir; he didn't see him there that week.
Q. Ask him if he saw a wounded horse there.
A. Yes, sir.
Q. Whereabouts?
A. Late Wednesday evening.
Q. Which way from the house did he see him?
A. South of the house.
Q. How close was he to the house?
A. He said he saw the horse standing a little distance from him, and just supposed it belonged to somebody there.
Q. When did he first learn that there had been somebody shot there?
A. He said he didn't hear it.
Q. When did he first find it out?
A. On Wednesday.
299 Q. How did he learn it?
A. Hog Shooter same there.
Q. Who with?
A. Squirrel Carey and John Carey.
Q. That is when he learned it?
A. Yes, sir.
Q. Was he there when the men came there to hunt for the marshal?
A. Yes, sir.
Q. What day was that?
A. They came there Thursday; not very many of them.
Q. Was it Thursday that Hog Shooter and Squirrel came there?
A. Yes, sir.

The DISTRICT ATTORNEY. He said it was Wednesday when they first came.

A. No; he says on Thursday and that he learned it from them—Hog Shooter and Squirrel.

Mr. BARNES. Ask him what time in the day or night Hog Shooter and Squirrel came there.

A. It was late; a little after sundown or night.

Q. Ask him again what day that was.

A. On Wednesday.

Q. Ask him when was the next time anybody came there.

A. On Thursday.

Q. Was there any more came after that?

A. Yes, sir; on Friday there was a good many came there.

Q. Who came there on Thursday?

A. Hog Shooter had a crowd with him; there was a good many of them.

Q. Ask him now when the men came there if there was any ax found there; if they searched around and got an ax there; and, if so, what day that was on, and how many axes, and where did they get them, and tell it all.

300 A. No; he said they didn't look for them.

Q. Did he find them?

A. No, sir.

Q. What day is he talking about?

A. On Thursday, he is talking about.

Q. Any time after that, was there any axes picked up by anybody, and, if so, when was that?

A. Yes, sir; they found some axes afterwards.

Q. How long afterwards?

A. About a week afterwards.

Q. Who was it?

A. He says Dave Snell's crowd found the axes.

Q. Tell him to tell where the axes were—where they got them.

A. He says right around the house somewhere.

Q. How many were there?

A. They brought in about five.

Q. Were they the axes used about the place?

A. Yes, sir; one, he says, they were using; the others were dull axes.

Q. Was there any blood on any of these axes?

A. He never noticed as to that.

Q. Did he see any?

A. He never saw any.

Q. What time did he say that he got home on Tuesday night?

A. About twelve o'clock Tuesday night.

Q. Then he didn't get home a little after dark, but about 12 o'clock midnight?

A. No, sir.

Q. On horseback, I believe.

A. Yes, sir.

Q. That was about midnight?

A. Yes, sir.

Q. What time did he say that Big Aleck met him?
A. Wednesday evening.
Q. What time Wednesday evening?
A. He says that he could not say, but the sun was about that high [indicating.]

301 Cross-examination:

The DISTRICT ATTORNEY. Q. That would be about three or four o'clock?
A. Yes, sir; it would be about three.
Q. Would it be about this time in the afternoon, about like it is now?
A. Yes, sir.
Q. It is now five minutes to five o'clock. It was just about this time in the evening, was it?
A. Yes, sir; about this time.
Q. Did he see him at any time before that?
A. No, sir.
Q. Did he see him when he came home?
A. Yes, sir; he saw him when he came past his house.
Q. Did he come home horseback or on foot?
A. He was on foot.
Q. Is he certain that was in the afternoon or evening, about five o'clock, about this time in the afternoon?
A. Yes, sir.
Q. Ask him if it wasn't about ten or eleven o'clock, and if he didn't tell Big Aleck at ten or eleven o'clock on that day that Sam was at home, and that Big Aleck didn't know it until he told him. Ask him if that is not true?
A. Yes, sir; he told him that he said.
Q. When; in the forenoon?
A. Late in the evening.
Q. Sam was there late in the evening, was he?
A. Yes, sir; he was there a little while.
Q. Before dinner or after?
A. After dinner.
Q. Where did Sam get his dinner?
A. At his house.
Q. Then it is not true that that occurred before dinner, about ten or eleven o'clock, or sometime before dinner; did Sam eat dinner with him?
A. Yes, sir; he says he ate dinner there.
Q. Did he eat breakfast, too?
A. Yes, sir.

302 Q. He said awhile ago that he only saw him a few minutes that day, and that was just while he was at breakfast. He came in and ate his breakfast and then went away, and didn't see him any more. That is what he told Mr. Reed.
A. He said he saw him again that evening.
Q. Why didn't he tell it; why did he tell Mr. Reed that he didn't, that he only saw him a short time at breakfast? Ask him what he told that for; ask him if he didn't tell that because he knows he is not telling the whole thing about this, and that he saw that body taken away from there, and knows all about it.

A. No, sir; he denies that.
Q. Then what is he telling two tales here for?
A. He says he was back there for dinner.
Q. Where did Big Aleck take dinner?
A. He says he guesses he got dinner somewhere.
Q. Aleck hadn't gotten home at dinner time?
A. No, sir.
Q. How does he know?
A. He was off somewheres at that time.
Q. Did he go down to Big Aleck's house to see if he was at home?
A. No, sir; he didn't go.
Q. Why didn't he go that short distance?
A. He was just at home.
Q. Very well, he saw Big Aleck come home, and he told Big Aleck Sam was there. Where was Sam when he told Big Aleck that?
A. He was in his house.
Q. Whose house?
A. Aleck's.
Q. How did he know that Sam was there?
A. He went after some wood, and he passed by the house and saw him setting in the house.
303 Q. Was that before Big Aleck came home or afterwards?
A. After he came home.
Q. He saw him after Big Aleck came?
A. Yes, sir.
Q. He must have started after his wood pretty late if Big Aleck didn't get home until after five o'clock.
A. Yes, sir; it was late.
Q. What time did he get home after going for the wood?
A. He wasn't gone very long.
Q. How did he bring his wood, in his arms?
A. Yes, sir; in his arms.
Q. He brought the wood on his shoulder?
A. Yes, sir.
Q. What time did he get back; was he getting the wood to get supper with?
A. Yes, sir.
Q. Then Sam was there pretty late in the evening on Wednesday, was he?
A. Yes, sir.
Q. How long did Sam stay there?
A. Just a short time.
Q. Then it is not true that Big Aleck came home between ten and eleven o'clock, and that this man told Big Aleck before dinner that he was there, and that Sam only staid a short time; and before dinner he left and never came back any more.
A. No, sir.
Q. Did he see anybody there on Tuesday night, or come around the house, or hear them?
A. He said Hog Shooter is the only one.
Q. Nobody but Hog Shooter?

A. There was but two of them came there.

Q. Who was the other one besides Hog Shooter?

A. He says they thought it was Squirrel.

304 Q. Did he speak to them?

A. No, sir.

Q. Why not?

A. He said he didn't know what they were after.

Q. He says they thought it was Squirrel. Who thought it was Squirrel?

A. Him and Big Aleck, he says.

Q. Tell him he has sworn that Aleck wasn't home on Tuesday night, and didn't get home until late Wednesday evening, and now he says that Hog Shooter and a man they thought was Squirrel came, and Aleck and him thought it was Squirrel, and he says that Aleck wasn't at home. Ask him how he fixes that up.

A. He says he must have misunderstood him or me. He said he said that he wasn't at home on Tuesday night.

Q. I asked him to tell me if he saw anybody on Tuesday, and you said he said Hog*hx* Shooter and another one. Tell him he said, in answer to your question, that Hog Shooter and another man was there that he and Aleck took to be Squirrel, and that they were there on Tuesday night. Call his attention to that fact, and to the fact that he has testified Aleck wasn't there Tuesday night, and let him explain that.

Mr. BARNES. He may have misunderstood the int*t*erpreter, or the interpreter misunderstood the witness.

The DISTRICT ATTORNEY. If the witness says so it is all right, or if the interpreter says so it is all right. Tell him that he has sworn Hog Shooter and another man that he and Aleck took to be Squirrel was there on Tuesday night and call his attention to the fact that he said

305 that Aleck wasn't there at all until Wednesday evening at five o'clock, and ask him how he explains that; that he and Aleck thought it was this man on Tuesday night, if Aleck wasn't there.

A. He says that Aleck didn't come back until Wednesday evening about that time.

Q. Then it could not have been him and Aleck that thought it was Squirrel that was there. It must have been him, and somebody else thought it was Hog Shooter when he came there Tuesday night?

A. Yes, sir; but he says he wasn't at home Tuesday night.

Q. If he wasn't at home Tuesday night how could he have seen Hog Shooter and another man that he took to be Squirrel, if he wasn't at home Tuesday night?

A. He says he never said Tuesday. It was Wednesday night.

Q. What time Wednesday was it?

A. Just a little after dark.

Q. Had he gone to bed?

A. He says they had just eaten their suppers.

Q. Had he gone to bed?

A. No, sir; he says they hadn't gone to bed.

Q. He puts it Wednesday night now?

A. Yes, sir.

Q. He says now that that was upon Wednesday night. At any rate upon the night that Hog Shooter and his brother Squirrel were there by himself, he and Aleck were there, were they not?

A. Yes, sir; he says they were both there.

Q. On the next night, ask him if Hog Shooter and four or five men didn't come there on the next night after the two men came there?

A. No, sir; he never noticed.

Q. He didn't notice anyone. Ask him that again if he didn't notice them around there the next night?

A. He says not.

Q. Did he speak to them the first night they were there?

306 A. No, sir.

Q. The night that he saw Hog Shooter and Squirrel, was there anybody but these two?

A. Yes, sir; there may have been more with them, but they didn't come to the house.

Q. They were the only ones that came to the house?

A. Just them two.

Q. Ask him if they went up to the house?

A. Yes, sir.

Q. Was he at home?

A. He says him and Aleck were there together.

Q. At his house or Aleck's?

A. At his house, he says.

Q. They had a little fire in the house, didn't they?

A. Yes, sir.

Q. These man hollered on the outside in Cherokee, didn't they; hollered if they were asleep?

A. Yes, sir; out a little piece.

Q. What did they halloo; what did they say?

A. He says they said this: "What has happened; what have the boys done?"

Q. Did they answer them?

A. He told them——

Q. I think he said he didn't speak to them?

A. He said he told them that they hadn't done anything.

Q. He said a minute ago that on that night he didn't speak to them at all. How is he going to reconcile that?

A. He says as to him is what he meant; he says that he mean' the other time.

Q. Did he say that Big Aleck answered?

A. Yes, sir; he says that they were talking to big Aleck.

Mr. BARNES. What night does he put that on?

The DISTRICT ATTORNEY. That is Wednesday night?

A. Yes, sir.

Q. He told Mr. Reed on the examination in chief, and he also told me that neither one of them said anything when they came up there.

307 Call his attention to that. He has stated that twice in this examination. Tell him this, that that time that Aleck spoke must have been some other time, because he has already said twice that neither one of them answered them; that they didn't know it to be Squirrel, but

took it to be him. Let me read just what he said to me in the cross-examination: "I saw Hog Shooter and another one we thought to be Squirrel; we didn't speak to them, me nor Aleck."

Mr. BARNES. That was Wednesday night.

The DISTRICT ATTORNEY. "Wednesday night we didn't speak to them." What does he say about it now? He must be a little mixed on that. Tell him I want him to straighten it out. It must be some other time he is talking about. He would not say that him and Aleck didn't speak to them that night if they did.

A. No, sir; it was Wednesday night; that is the only time he is talking about.

Q. It is Wednesday night that I am talking about. I am talking about the fact as to whether or not they said anything. He has sworn that him and Aleck neither one spoke to Hog Shooter or Squirrel on that Wednesday night. Ask him if that is true.

A. He says they didn't talk to him; it was the old man.

Q. Ask him if anybody came there the next day, on Thursday.

A. He says there was several came there?

Q. On Thursday or Friday?

A. Yes, sir; on Thursday?

Q. Who were they?

A. He didn't know some of them.

Q. I don't want him to tell those he didn't know?

A. He says these are the men that are here now; Phillip Ben-
308 nett, and Hog Shooter.

Q. Was Neal Nugent there?

A. Yes, sir; he was there.

Q. Did he see Hog Shooter and Neal Nugent at anytime when they were by themselves?

A. Yes, sir.

Q. Ask him if he had any dog killed up there during that night?

A. He says he guesses it might have just died.

Q. Did he tell people up there that that blood lying on the outside was his dog's blood—told Carey and these people?

A. He says it was the horses, he reckons, that had been shot.

Q. He says he told them it was the horses' blood?

A. Yes, sir.

Q. Did he tell them that he lost a dog, and that might be his dog's blood?

A. No, sir; he never told them about losing his dog.

Q. Never told them anything about a dog?

A. No, sir.

Q. Never told them in the presence of Big Aleck or anybody else about the dog?

A. No, sir.

Q. Big Aleck was there, wasn't he, and heard what was said?

A. Yes, sir.

Q. Tell him to think about that?

A. He can't remember saying anything about the dog; just says he didn't do it; don't recollect anything about the dog, about having said anything about it.

Q. He swears that he didn't tell them anything about the dog; that the blood was the dog's blood?

A. Yes, sir; he swears that.

Q. Ask him if he helped carry that body away from there?

A. No, sir.

Q. Ask him how it got away from there without some of them
309 knowing anything about it?

A. He says he don't know.

Q. When he left there, who did he leave at the house?

A. He says Aleck.

Q. He left Hickory, too, didn't he?

A. Yes, sir; when he left he was there.

Q. Then if him and Big Aleck was away from there, it left nobody but Hickory to do it?

A. He says him and his wife were there.

Q. Aleck's wife?

A. No; Sam's wife.

Q. He don't know anything about how the horse was shot, does he?

A. He says it was shot accidentally, he guesses.

Q. Got in the house and got shot there where they were fighting?

A. He says that the horse was hit on the outside; during the shooting it was shot accidentally.

Q. How does he know that? Did he see it?

A. Yes, sir; he says he saw some blood on the post where the horse might have stood. It looked like it had stood there.

Q. Did he say he saw blood on the post?

A. Yes, sir; where the blood was on the post.

Q. Did he see some blood there on the post?

A. Yes, sir; he saw the blood out there in the direction of where the bullet came that went through the post.

Q. Ask him if it isn't this way; that he saw the blood out there on the other side of that post that had the bullet in it?

A. Yes, sir; he says he saw some blood out that way.

Q. The post was between the blood and the door, wasn't it?

A. He says the blood was beyond the post.

Q. Tell him that this is the house, and here is the porch, and
310 here is the post. The blood was out here [indicating]?

A. He says it was the middle post.

Q. There are four posts, are there not?

A. Three.

Q. Only three posts on the porch?

A. Yes, sir.

Q. Ask him if he saw any bullet holes through this post [indicating].

A. Yes, sir.

Q. There was the door here?

A. Yes, sir.

Q. And the blood over here?

A. Yes, sir; he says the bullet came out this way, and glanced that post, and went through that post, and the blood was out here.

Q. Who put the fire on that blood?

A. He says he don't know.

Q. He saw ashes on it, didn't he?
A. Yes, sir.
Q. He says there was blood out there, and that is the reason he knows the horse was shot. How does he know horse's blood from a man's blood?
A. He says he tracked the horse.
Q. Tracked the horse?
A. Yes, sir.
Q. He was doing some tracking, was he; what was he doing that for; why was he out tracking that horse?
A. Just because, he said.
Q. What for?
A. He just wanted to know what kind of blood it was.
Q. Where did he track it to?
A. Some distance out.
Q. Which way?
A. In that direction [indicating].
Q. In the direction of where the horse was found?
A. Yes, sir.
Q. When did he do that?
A. On Thursday.
Q. Before the men came there Thursday?
A. Yes, sir; before they all came.
311 Q. Did he find it was horse's blood when he tracked it?
A. Yes, sir.
Q. How did he find that out?
A. He says there was blood all along with the track.
Q. Did he go to the horse?
A. He says he didn't go but just about ten steps out.
Q. He said awhile ago he tracked it a good ways out towards where the horse went?
A. He says he didn't say that.
Q. How did he know it was horse's blood if he didn't see the horse?
A. He says he knew it was by the tracks; he said it was horse tracks.
Q. Ask him if he cut the horse's throat?
A. No, sir.
Q. Ask him if he stole the saddle and bridle?
A. No, sir; he was gone on Grand River at that time.
Q. Did he see the horse there?
A. Yes, sir; he did see him there.
Q. Where did he see him?
A. But then that is all.
Q. Where did he see the horse?
A. About two hundred yards.
Q. Was that the day he tracked it?
A. He said it was on Wednesday evening when he saw this horse, when he went to get the wood.
Q. Did it have any saddle or bridle on it?
A. He says not at that time.
Q. Did it have any shot in the legs?
A. He says he never noticed that.
Q. Was he limping?

A. He was just standing, and he never noticed.

312 Q. Did he tell the people that he saw that horse, and he was nearly dead; the people that came there?

A. Yes, sir; he told them that.

Q. What did he tell them it was nearly dead for, when he didn't know?

A. He says he never told them that; he says he never noticed.

Q. What time on Wednesday was it that he saw that horse?

A. The sun was very low.

Q. Saw the horse nearly sundown or sunset?

A. Yes, sir.

Q. Had old man Big Aleck got home yet?

A. Yes, sir.

Q. How long had Aleck been home?

A. He said he got home when the sun was about here (about four o'clock).

Q. If that horse's throat was cut by the same people that hauled off the dead man and the dead man was hauled off after that time, it must have been later than five o'clock, Wednesday, wasn't it?

Mr. BARNES. You haven't proven positively that the horse's throat was cut by anybody.

The DISTRICT ATTORNEY. Yes, sir; Snell swore to it positively.

INTERPRETER. He says he reckons it was on Tuesday.

The DISTRICT ATTORNEY. He said that he saw the horse on Wednesday, nearly sundown. Was it Tuesday that he saw it, then?

Mr. BARNES. He said he never saw the dead person at all.

INTERPRETER. Yes, si'; that is what he is talking about.

313 The DISTRICT ATTORNEY. But he saw the horse alive nearly sundown, Thursday, didn't he?

A. Yes, sir; he said it was Wednesday evening.

Q. Nearly sundown Wednesday evening he saw the horse alive, and him and Aleck were both at home at that time?

A. Yes, sir; both at home.

Q. This shooting in that house was done before that, before he saw that horse?

A. Yes, sir.

Q. If the same man that killed Wilson killed the horse, he must have come back after the shooting, must he not, and done it.

A. He says he wasn't at home.

Q. He was at home after he saw the horse alive?

A. Yes, sir; he says he was at home Wednesday evening.

Q. This blood that he saw out there he knew was horse blood, did he?

A. Yes, sir.

Q. Ask him when those gentlemen came there and asked him to go out and help hunt for the body if he told them anything about that being horse blood, and if he didn't tell them it was dog's blood or some other animal's?

A. He says not.

Q. Then he undertakes to tell that he and Aleck didn't know anything about where this body was, didn't know where the horse was, and didn't know anything about there being a dead man lying out there not far from the house that had been killed there, and didn't know when he was hauled away or anything about it?

A. Yes, sir; he says he denies knowing anything about it.
Q. Ask him if he saw anything more of Sam after that.
A. No, sir; he didn't see him any more.
Q. He went off, did he?
A. Yes, sir.
314 Q. Did he take his gun with him?
A. Yes, sir; he guesses he took it with him; he never noticed.
Q. Did Sam's wife leave too?
A. Yes, sir; she had gone to her mother's.
Q. Sam went on the scout, did he?
A. Yes, sir.
Q. Sam went on the scout, and the dead body got into the gulch there somehow?
A. Yes, sir.
Q. Did Sam leave before or after he saw the horse?
A. He had already left.
Q. He don't know anything about what became of the marshal's pistol?
A. No, sir.
Q. Ask him if he knows who got the marshal's coat.
A. No, sir.
Q. Ask him if he knows who got the marshal's saddle and bridle.
A. No, sir; he says he told you that he don't know anything about it.
Q. Ask him if he saw the dead body.
A. He says he didn't.
Q He knew that they had found it?
A. He says he guesses they found it.
Q. He knows they found it?
A. He wasn't with them when they found the body.
Q. Why; why didn't he go to help hunt for it?
A. He was tired.
Q. He and Aleck were both sick, were they not?
A. Yes, sir; he said they were sick.
Q. Didn't Mr. Paschal offer him a horse to ride if he would go?
A. No, sir.
Q. Didn't he tell Mr. Paschal he was afraid of horses?
A. Yes, sir; he says he told him that.
Q. Did Aleck go out and help hunt the body?
A. No, sir; he
315 Q. I expect he ate so much fish that the fish fries made him sick?
A. No; he didn't kill very many fish he reckons; he was just in wading in water.
Q. You agreed to go, didn't you, and then backed out right square?
A. Yes, sir.
Q. Ask him if he saw any blood except outside of the house.
A. No, sir.
Q. He didn't see any blood on the wagon, of course?
A. He says he didn't go out to see.
Q. The wagon has been there ever since?
A. He says he has never examined it.
Q. He saw no blood inside of the house?

A. No, sir; he didn't see any.

Q. Ask him who turned those planks upside down that had that blood on them inside there?

A. Paschal's crowd that was.

Q. Didn't Paschal's crowd turn them right side up?

A. He says he guesses they done that; he wasn't watching.

Q. Who turned them upside down before Paschal's crowd got there?

A. He don't know; he wasn't there.

Redirect examination:

Mr. BARNES. When he spoke about where the sun was when Aleck came, he pointed out this way?

Q. Yes, sir.

The DISTRICT ATTORNEY. Just about where the sun was an hour ago—five minutes to five.

316 Recross-examination:

The DISTRICT ATTORNEY. Ask him if he didn't go around the house and throw a rock when Paschal rode up there Friday morning.

A. No, sir.

Q. Did he go around the house?

A. No, sir.

Q. When Mr. Harlow and Mr. Paschal rode up together?

A. No, sir.

Re-redirect examination:

Mr. BARNES. He says there is three posts there to that porch.

A. Yes, sir.

Q. How far was that blood spot from the middle post.

A. He says some distance.

Q. Doesn't he know?

A. About six steps, he reckons.

Q. Ask him if he saw any other blood spots out from the corner post.

A. No, sir; he didn't see any.

Q. Did he look for any?

A. No, sir; he didn't look for any.

(Witness excused.)

Here court adjourned until to morrow morning, at 8:30 o'clock.

317 TUESDAY MORNING, *August* 23, 1892—8:30 a. m.

WILLIAM TAYLOR, called on behalf of the defendant, testified as follows, to wit:

Mr. REED. What is your name?

A. William Taylor.

Q. Where do you live?

A. I live in Tahlequah.

Q. Do you know Tom Shade here, one of these defendants?

A. Yes, sir.

Q. Did you learn of Marshal Willson being killed in the Indian country?

A. Yes, sir.
Q. Did you learn what day of the week it occurred on?
A. Yes, sir.
Q. What day of the week?
A. It was done on Tuesday, I think the killing was.
Q. State whether or not you saw him in Tahlequah the next day after that.
A. Yes, sir.
Q. What time of day?
A. It was along in the forepart of the day.
Q. The next day after the man is said to have been killed?
A. Yes, sir.
Q. Whereabouts did you see him?
A. I saw him there on the streets of Tahlequah, riding down the street.
Q. Was he riding or walking?
A. He was riding.
Q. The forepart of the day?
A. Yes, sir.
Q. On Wednesday?
A. Yes, sir.

318 Cross-examination. The DISTRICT ATTORNEY. Did you speak to him—talk to him?
A. I spoke to him was all.
Q. Did you have any business with him?
A. No, sir.
Q. You just merely saw him going by, and passed on?
A. Yes, sir.
Q. Who else did you see that day?
A. I saw several right there in town.
Q. What day of the month was that?
A. It was in September, about the latter part of September.
Q. How do you know that you saw him—how do you remember that it was the next day that you saw him?
A. When the report came that the man was killed, they said that Tom Shade was the one that done the killing on Wednesday, and I spoke and said that I had seen him there in town on Wednesday.
Q. When did that report get out that Tom Shade had killed him—on Wednesday?
A. On Thursday it got out over the country.
Q. You say then that the report came that Tom Shade killed a man on Wednesday. Or did you say he was killed on Tuesday?
A. He was shot on Tuesday I heard; the report come he was shot on Tuesday, and Tom Shade went to him and knocked him in the head Wednesday; that was the way it was in town.
Q. You said to Mr. Reed you knew the time that the man was killed, and it was on Tuesday.
A. There was a report started he wasn't killed until Wednesday.
Q. It was the day after he was killed that you saw this man, was it? That would make it Thursday, if he was killed on Wednesday.

319 A. He was shot Tuesday.
Q. So you saw him there in the forenoon on Wednesday?

A. Yes, sir.
Q. What time in the forenoon?
A. Along about ten or eleven o'clock, somewhere along there.
Q. Do you know what time you saw him?
A. No, sir.
Q. It might have been noon, or might have been eleven?
A. Yes, sir; along in the forenoon.
Q. It might have been as early as nine or as late as twelve?
A. It was in the forenoon.
Q. How far is it to 14-mile creek? It is nearly fourteen mile' from Tahlequah, isn't it?
A. You can go some places on it, and it is less than that.
Q. How far out is it out to where the killing occurred?
A. I don't know; I never was out there.
Q. You just saw him that once, passing in the street, on horseback?
A. Yes, sir.
Q. Which way was he going?
A. Going right down the streets of Talequah.
Q. You didn't see anything more of him that day?
A. No, sir; I never noticed.
Q. If you noticed him once you would notice him again. Did you see him the next day, Thursday?
A. No, sir.
Q. Did you see him Tuesday?
A. No, sir.
Q. Was he in there Tuesday?
A. I don't know whether he was or not.
Q. You would have seen him if he had been there, would you not?
A. I don't know whether I would or not.
320 Q. If he was there Tuesday for some little time you would have been as likely to have seen him as on Wednesday?
A. If I had been in town, I would.
Q. Were you in town?
A. I don't know.
Q. How is it you know the whereabouts of other men, and don't know the whereabouts of yourself.
A. I seen him on Wednesday.
Q. Where were you Tuesday?
A. I was around there somewhere.
Q. Were you in town?
A. Yes, sir, I was in town, but I wasn't down in town.
Q. You now remember you were in town on Tuesday, do you; you know you were in town on Tuesday?
A. Yes, sir.
Q. How is it you can't tell me where you were on Tuesday?
A. I could tell if I wanted to.
Q. I want you to tell; I want you to want to; if you could if you wanted to, proceed to want to at once.
A. I was in town on Tuesday.
Q. You know now you were?

A. Yes, sir.

Q. Did you know that you were in town when you told me you didn't know?

A. I was in town.

Q. Did you know when you told me a few minutes ago you didn't know where you were on Tuesday? I can't see why you are avoiding Tuesday, unless it was Tuesday you saw Tom Shade in town, when it was known that he was there. You can stand aside.

Redirect examination:

Mr. REED. When was it you learned of the report of the man being killed?

321 The COURT. I don't believe you have a right to take the witness, unless it is new matter. That ought to have been asked him at first.

The DISTRICT ATTORNEY. He has already stated that.

The COURT. Unless you have got some new matter, you needn't ask him.

Mr. REED. I overlooked that.

The COURT. You ought not to have overlooked it.

The DISTRICT ATTORNEY. He has already stated that.

The COURT. He said he heard it the next day.

322 C. L. BOWDEN, called on behalf of the defendants, testified as follows:

Mr. REED. What is your name?

A. C. L. Bowden.

Q. Where do you live?

A. Live near Fort Gibson, Indian Territory.

Q. State if you learned about the time that Wilson is said to have been killed up near Tahlequah.

A. Yes, sir; but I don't remember the exact time.

Q. What was your business then?

A. I was a deputy marshal for this court.

Q. State if you went out any time after that to see the place, made any examination of it.

A. Yes, sir; I was out there shortly afterwards; I don't remember the exact time; probably ten or twelve days.

Q. In the following month?

A. Yes, sir.

Q. Were there some persons with you?

A. Yes, sir.

Q. What did you see there in the way of the evidence of the shooting? Did you go to the house where it is said to have occurred?

A. Yes, sir; I went to the house.

Q. Can you describe the bullet holes that you saw there?

A. Well, yes, sir; in the front door there was two bullet holes; through the front door of the house.

Q. Were there any others about the front of the house?

A. There was a shot struck a post in going into the door to the right; struck one post there.

Q. How many posts were there in front of the house?

A. I am not positively certain; there is either three or four;
323 my recol'ection is there was three or four. There was two posts struck; one to the right of the door, and the other probably a little to the left.

Q. Here is a sort of a diagram and you say shots struck a post here, where I will mark letter A.

A. Yes, sir.

Q. Which course was that shot?

A. It looked like it was going towards the house. Struck the post and glanced to the house, or at least there was a shot struck the house, and I supposed it was the same shot.

Q. How close to the door was the shot?

A. It wasn't very far. Struck and glanced along the side of the wall right there.

Q. Glanced right up where I mark the letter B?

A. Yes, sir; just struck and run right along there.

Q. Now, I will put the letter C where you say the other shot was in the post?

A. Yes, sir.

Q. Which course did that *v* go?

A. I am not positive what course it was. It was struck here, though, and it looked as though it might have come from the house this way.

Q. Out of the door?

A. Yes, sir; it had that appearance. The two shots that were there, my idea is they come from the house, and come out.

Q. They were coming from the inside?

A. I think so.

Q. Did you observe any shots about the porch there?

A. Yes, sir; there was a shot struck the porch, struck the floor, and just scraped along on the floor.

Q. Where was that with reference to the door?

A. Very near the door; I supposed the shot came from the door, also.

Q. You took it to be a shot also that came from the door,
324 and struck the porch out this way?

A. Yes, sir.

Q. I will put the letter D here, and let it represent that shot from the door. What other shots were there?

A. There was a shot glanced the door that went into the side room here. There was a side room here, and there was a glanced shot on that door.

Q. There was a shot glanced on the door and struck the back part of this little side building, or side room you might call it?

A. Yes, sir.

Q. This here on the diagram represents it?

A. Yes, sir.

Q. That door is nearly opposite this one. We will let F represent where you say that shot struck that door.

A. Then there was a shot to the right of the window; there was a little window to the side room, at any rate, at the little window, eight or ten inches of the door. I will place the window a little nearer than you have got it on this diagram.

Q. Then that shot would be there where I put the letter G. This shot struck this door and came out here?

A. I suppose there was a shot struck this door and came out here; I don't know whether it was the same shot, but there was a shot struck this.

Q. We will let the letter H represent where you say that shot went out there in the side room.

A. Yes, sir; something near that.

Q. I will ask you if there was a shot about this end door—this east door to the side room?

A. Yes, sir.

Q. Do you know how that got there?

A. When I first went I didn't notice that shot there. I noticed there was two shots here, and the shots on these two posts, and the shot
325 there I didn't notice it. I went down to a little house, 75 or 100 yards from there, on the same place, and when I came back I noticed that shot. There was a shot fired there, and I never noticed it until I came back.

Q. When you went down there was there a shot fired in that house?

A. There was a shot fired. I suppose it was fired by the posse.

Q. Who was it that you left there?

A. Sut Still and Sterling McDaniel.

Q. When you first made the examination you didn't see any shot there?

A. No, sir.

Q. While you were down by that house you heard a pistol shot?

A. I heard some kind of a shot.

Q. And you came back and noticed that shot?

A. Yes, sir; to the right of the door going in.

Q. Was it a fresh shot?

A. It seemed to be.

Q. What else was there?

A. There was a saddle hanging close by.

Q. Where is Sut Still now?

A. He is in Tahlequah prison.

Q. Where is McDaniel?

A. He is dead; he was killed.

Q. They were two young men?

A. Yes, sir.

Q. They were along with you?

A. Yes, sir; they were with me.

Q. You speak of a saddle being there?

A. Yes, sir.

Q. Was a shot about the saddle or through it?

A. Yes, sir; seemed to be struck by a shot near the horn—I believe just below the horn, probably just by the side of the horn.

326 Q. Did you arrest Hickory?

A. I did, some time previous to this.

Q. When was it?

A. I don't remember; it was several months before; I could not tell you just what time; it was probably six months; may be longer.

Q. Where did you arrest him?

A. At his mother's, near Fourteen Mile Creek.
Q. Did you have any trouble with him?
A. No, sir.
Q. Was you by yourself?
A. Yes, sir.
The COURT. What is the object in asking if he had any trouble with him; what is the purpose of that?
Mr. REED. We want to know if he submitted quietly.
The COURT. Yes, sir; sort of throwing in something that don't belong there.
Mr. REED. Did you examine these shots going out of the door?
A. I didn't examine them particularly; I noticed five going in and out.
Q. You went there, I suppose, to make the examination?
A. No, sir; I went there to make an arrest. I understood that the party was near there, and I went there to make the arrest if he was there.
Q. Could you tell what the shots from the door had been made with?
A. No, sir; I could not.
Q. You didn't examine them close enough?
A. No, sir; it looked like it might have been a .44; something of that caliber—.45; I could not tell.
The DISTRICT ATTORNEY. If you don't know don't say.
327 Cross-examination:
The DISTRICT ATTORNEY. The best way when you don't know anything is to say nothing about it. You say you are a deputy marshal?
A. Yes, sir.
Q. You were a little mad, Bowden, because another deputy got to make this arrest?
A. No, sir.
Q. You didn't have any feeling because of that?
A. No, sir; I have not.
Q. You didn't arrest either one of these parties finally?
A. No, sir; neither one of them.
Q. Did you ever have a writ for Hickory afterwards?
A. Yes, sir; I had a writ for Hickory.
Q. Did you catch him?
A. No, sir.
Q. Did you look for him?
A. Yes, sir.
Q. What is the reason you didn't catch him?
A. I went there twice.
Q. What is the reason you didn't catch him?
A. He wasn't there.
Q. Why; didn't you know where he was?
A. I didn't know where he was; he was scouting.
Q. Couldn't you find out?
A. It was hard to tell where he was.
Q. He was scouting, was he?
A. Yes, sir; at least he wasn't at home; I suppose he was scouting.
Q. Did you make any inquiries for him?

A. Yes, sir.
Q. You couldn't find him?
A. No, sir.
Q. How long were you looking for him?
A. I went there to his place where he had lived twice.
Q. I suppose you made some little more investigation than that,
328 didn't you.
A. Yes, sir; continually.
Q. Did you keep on making inquiries?
A. I went there twice that same morning.
Q. Who did you take with you that morning you speak of; did you take Sut Still and McDaniel?
A. Yes, sir.
Q. Were you and they engaged there in making evidence; were you and your posse in the habit of shooting into houses?
A. No, sir.
Q. What were you permitting your posse to shoot into the house on that occasion for?
A. I don't know that he shot into the house; there was a shot fired.
Q. You have left the impression there was a shot fired into the house.
A. Yes, sir.
Q. Your testimony is for the purpose of showing there was a shot fired in the house. Do you know whether there was or not?
A. No, sir; I don't. I was at the other house, seventy-five or eighty yards away.
Q. Did you make any inquiries when you came back?
A. Yes, sir.
Q. What did they tell you?
A. Sut Still said he shot.
Q. What for?
A. I don't know; seemed to be angry, and he shot.
Q. What was he angry about?
A. I don't know.
Q. Did he shoot that hole in the house?
A. He said he shot in the house.
Q. Before he shot you saw the other shots?
A. Yes, sir.
Q. This hole by the door was made by him?
A. It might have been there, but I never noticed it before. I never noticed it until I came back from the old house; when I came up I noticed the shot.
329 Q. Why didn't you investigate the matter; you knew these shots would become important items of evidence? Did you ask Sut Still if he made that hole?
A. No, sir.
Q. Why not?
A. I just ask*ing* him was he shooting there.
Q. You are a deputy marshal?
A. Yes, sir.
Q. It is your business to hunt up evidence?
A. Yes, sir.

Q. It is your business to arrest men?

A. Yes, sir.

Q. You go on the stand here sometimes to testify; why not put yourself in an attitude so you could tell exactly where that bullet came from?

A. I don't know anything more than he said; he said he had fired a shot.

Q. How long have you been a deputy marshal?

A. About four years.

Q. In making inquiries about a thing of that kind don't you know that every shot, every bullet hole, every scratch about a place, is a matter of importance?

A. I am very particular where I go to make an arrest.

Q. I am not talking about that; I am talking about the evidence. It seems that you and your posse were there to make evidence instead of find it.

A. I heard a shot fire', and I went there and I saw the hole; it might have been there, possibly, before.

Q. It was your duty to inquire.

A. I never examined the house so closely as that.

Q. You have stated minutely how many bullet holes there was, and have told which way they went.

A. The shot might have been there and I not have noticed it.

330 When I went there I noticed the house, walked around there, and saw the shots; and I noticed several shots, and this shot might have been there at the time and I didn't see it until I came back.

Q. But you heard a shot and saw the bullet hole afterwards?

A. Yes, sir.

Q. You knew from the appearance of the hole whether it had been shot a week or twelve or fifteen days before that?

A. No, sir; I didn't notice it that closely. It might have been shot at the same time.

Q. What in the dickens were you looking at the shots for?

A. I noticed the shots some.

Q. You were there as a deputy marshal to notice them minutely?

A. I never noticed them very particularly.

Q. You had better learn your business. Did you see any blood?

A. Yes, sir; I seen blood on the floor.

Q. You forgot to mention about the blood?

A. I wasn't asked the question.

Q. Where did you see the blood?

A. In the little room. There was little spots in the little room.

Q. Just in spots, was it?

A. Yes, sir.

Q. Where in the little room?

A. Near the door; a little from the door; there seemed to be two or three spots there.

Q. Towards what door?

A. The door that leads from the side room; I described it as the side room.

Q. There is two doors in the side room?

A. There is a door in the end of the side room, going in.

Q. Is there where the blood was?
A. Yes, sir.
Q. Near the front door of the side room?
A. Yes, sir.
Q. Was it anywheres else?
A. I don't remember seeing it anywheres else.
Q. How is it there was no blood nowheres else?
A. There might have been.
Q. Why didn't you observe it; why were you out there; just simply to look for bullet holes?
A. I wasn't looking for bullet holes.
Q. You didn't notice blood anywheres else. Are you willing to say there was blood nowheres else?
A. No, sir; there might have been; that is the only place that I noticed. A little spot of blood by the door.
Q. About how big spots?
A. In little places; I could not say exactly.
Q. About how large?
A. It looked like it might have been, say, something like seven or eight, or ten inches around.
Q. Do you call those little spots of blood?
A. Yes, sir.
Q. Ten inches in diameter?
A. Yes, sir; it might have been that much. Maybe one of them might have been a little larger.
Q. Did you go out to where the dead horse was?
A. No, sir.
Q. Whose saddle was that hanging up in there?
A. I don't know whose saddle it was.
Q. What kind of a looking saddle was it?
A. It was just an ordinary saddle.
Q. Common old saddle, was it?
A. Yes, sir; it was a saddle that had been used. I had seen the one that Wilson rode and I don't think it was the same saddle. I am not positive about that.
Q. Wilson's saddle was a new, fine saddle?
A. It was a good saddle; I don't know that it was a new saddle. I saw it before that at Tahlequah and it was a good saddle.
Q. That wasn't Wilson's saddle?
A. No, sir; I didn't take it to be.

Q. What time of day did you arrest Hickory when you
331 arrested Hickory and on what charge was it?
A. It was on a whiskey charge, there, and after sundown.

Q. You got him at home?
A. Yes, sir.
Q. Why did you go after sundown; why didn't you go in the daytime?
A. I went there before sundown and I waited till he came in.
Q. You got the drop on him?
A. He came in driving a wagon.
Q. You got the drop on him?

A. Yes, sir; he came in driving a wagon after sundown.

Q. I don't suppose you gave him any chance to give you much trouble?

A. I don't give any man any chance; I don't propose to give him any advantage of me if I can avoid it.

Q. Do you find out, in your experience as a deputy marshal, more difficulty in arresting men the second time for whiskey after he has come down here once and served a sentence and received the admonition of the judge that if he ever comes again he will send him to the penitentiary?

A. Yes, sir; I do.

Q. The second time than the first?

A. Yes, sir; I do.

Mr. BARNES. We object to that question. It is an assumption that this man received an admonition and there has been no proof of it.

The DISTRICT ATTORNEY. I will ask you if you don't find it harder to arrest men on a second charge than the first, especially when he has been convicted.

A. Yes, sir; a man is more cautious, probably.

Q. You say you had arrested him once before.

A. Yes, sir.

Q. You never arrested him but once?

A. No, sir.

(Witness excused.)

332 DAVE RUSK recalled on behalf of defendants.

By Mr. REED:

Q. Were you acquainted with Wilson?

A. Yes, sir.

Q. What size man was he?

A. He was a small-like man.

Q. What was his weight, do you suppose, in your judgment?

A. I never seen him weighed; I don't know exactly.

Q. What would be your judgment as to his weight?

A. I suppose he would weigh 140; somewhere along there; may be more and may be less.

Cross-examination:

The DISTRICT ATTORNEY. Q. 140?

A. Yes, sir.

Q. Small man?

A. Yes, sir; a small-like man.

Q. How much will Hickory here weigh?

A. I suppose Hickory will weigh 150 or 160 pounds.

Q. You think he was a man 15 or 20 pounds less than Hickory?

A. Yes, sir; he was a small fellow, Wilson was; spare made.

Q. Do you think he would weigh 15 or 20 pounds less than Hickory?

A. Yes, sir; I expect he would.

Q. How did he compare with Tom Shade?

A. He wasn't as heavy a man as Tom Shade.

Q. Not as heavy a man as either one of these men?

333 A. No, sir.

Q. Young man, wasn't he?
A. Yes, sir.
Q. Did he wear any beard?
A. He wore a little moustache, I think.
(Witness excused.)

334 G. S. WHITE, called on behalf of defendants.

By Mr. BARNES:

What is the distance, in your judgment, from the court-house to the jail?

The DISTRICT ATTORNEY. He is not an expert. You can have it measured if you want to know the distance.

Mr. BARNES. You see that building over there, do you?

A. Yes, sir.

Q. How far is it from here to that building, according to your best judgment?

The COURT. The jury can see that for themselves. It is right before their eyes and they can judge of that.

The DISTRICT ATTORNEY. Not only can they do that, but it is right here and they can measure it.

The COURT. It is a matter of common knowledge or else it is within the judgment of an expert, one or the other. If it is a matter of common knowledge, and the jury are pointed out the distance, they can see for themselves from where they are sitting.

Mr. BARNES. We are making a record here, and there was a witness on the stand spoke of seeing Tom Shade at a certain point that was about as far as from here to the jail.

The COURT. I never heard of the Supreme Court refersing a case on facts. They distinctly disavow doing it. It don't make any difference about getting that in the record. It can't benefit you in any way by getting it in the record in that shape.

335 Mr. BARNES. I want now to read the testimony of Dr. Blake.

The testimony of Dr. Blake was then read as follows:

United States circuit court, western district of Arkansas.

UNITED STATES
vs.
THOMAS SHADE,
SAM HICKORY. } Upon charge of murder.

W. G. Blake, being first duly sworn, says: That he [is] 47 years old, and has practiced medicine for 18 years last past. That affiant has lived in Tahlequah, Ind. Ter., for the past eight years and practiced his profession.

That on the 26th day of Sept., 1891, a party of men brought the dead body of a man to Tahlequah, said to be the body of Joe Wilson. They came, I think, in the evening, and Ridge Paschal requested me to examine the character of the wounds on said body, which I proceeded to do, and found a penetrating wound having an appearance that satisfied me that it

was a gunshot wound, entering between cartilege of the fifth and sixth rib, and about one and half inches below the right nipple, and to the inner side, and perhaps half inch from sternum bone.

There was a corresponding wound on the back as if the said front wound might have been a bullet and gone through, coming out about two inches from center of back, on the right, and just under lower border of shoulder blade. If this wound was made by a bullet, I can't say whether it entered front or back, but of this I am not positive.

336 There was two scalp wounds, viz: One in top of head, two inches in the hair, from front, about three inches long, crossways of the head, going through scalp to the covering next the skull bone, tearing up the scalp about two inches toward the back of head. The other scalp wound was on back of head between right ear and center of back of head, about same depth, but not so long as wound on top of head, exposing the skull bone. I can not say that the skull bone under either wound on the head was fractured. The wounds on the head had the appearance of having been made by some blunt substance striking the head or the head striking the substance. The body was badly decomposed or decayed, and badly swollen, and in all of the wounds and decayed places in the skin they were full of developed mag'ots devouring the body, and in my judgment the man must have been dead from two to four days. The remains then smelled very badly, so badly that it took a person of strong physique to endure it in the room.

I saw no other wounds than I have described.

(Signed) W. G. BLAKE.

Sworn to and subscribed before me this 15th day of Aug., 1892.

STEPHEN WHEELER, *Clk.*
By I. M. DODGE, *D. C.*

The above was read in evidence by agreement.

337 AARON CAREY, recalled by defendants for the purpose of further cross-examination.

By Mr. REED:

C. Do you know this man they call Skalola or Squirrel?

A. Yes, sir.

Q. Do you remember of having a talk with him about this case near the City Hotel last week?

A. No, sir; I don't remember.

Q. Don't you remember taking him out to one side and having a talk with him?

A. No, sir; I don't remember.

Q. About ten days ago, or last Saturday week?

A. No, sir.

Q. Did you have a talk with him down there and say to him you wanted to tell him something, and that you said to him that "us three are going to be pretty hard on Tom Shade?"

A. No, sir; I never told him any such thing as that.

Q. You gave names of them; they being yourself, Bryant Hughes, and Jeff Osage?

A. I never told him any such thing as that.

Q. And gave as your reasons for it that he and Tom had——

The DISTRICT ATTORNEY. State what he said.

Mr. REED. Told him that the reason you did this was that you and Tom had a fight, or that Tom had struck you up at the convention?

A. No, sir; I never had any talk of that kind.

Q. And that you were not going to be hard on Sam. Did you have that talk with him?

A. No, sir.

Redirect examination:

The DISTRICT ATTORNEY. You had no such talk with him?

A. No, sir.

Q. It is not true that you had any such a talk with him?

338 A. We never did talk that way; we never did speak about this case.

(Witness excused.)

339 JIM SQUIRREL, recalled by defence, and examined through Interpreter Walkingstick:

By Mr. REED: Ask him if he knows Aron Carey.

A. Yes, sir.

Q. Ask him if Aaron had any talk with him near the City Hotel since he has been here, about this case.

A. Yes, sir.

Q. Ask him when it was.

A. Last Saturday was a week ago.

Q. Tell him to tell just what Aaron said to him; tell it, all that he can remember.

A. He said he told him, "Let's go up a little piece, I want to talk to you."

Q. Well, go on.

A. He said, "I am going to tell you just how it is." He said, "Me and Sam had been friends ever since we were little fellows, used to be together all the time." He said, "We are going to help Sam along."

Q. Tell him to tell all of it.

A. "But as to Tom, we are going to work hard against him." He hit him at this place [indicating on arm] at the convention, and he said for that reason they was going to do that.

Q. What else?

A. He said out back where he lived that Tom was considered a bad boy. That was all that Aaron told him, and that was all he said.

Q. He said that he said "We." Who did he mean by "we?"

A. He said he didn't understand what he meant by that.

Q. Ask him if Aaron gave the names of those that were going to be hard against him.

A. He says he never said.

340 Cross-examination:

The DISTRICT ATTORNEY. When was it that he had this conversation?

A. It was a week last Saturday.

Q. When was it that he talked to me in my office?
A. It was after that.
Q. Why did he not tell me about it?
A. He said he couldn't tell it then.
Q. Why couldn't he tell me?
A. He said he didn't tell you anything about it.
Q. Why couldn't he tell me?
A. He said he didn't know anything about your ways here, how you did it.
Q. He knew that the Government had brought him here as a witness?
A. Yes, sir.
Q. He knew that I was a Government officer, and, as district attorney, had charge of this case?
A. Yes, sir.
Q. He talked with me about the case. Didn't I ask him to tell me everything that he knew, over and over again?
A. He says that was about all that he could tell; that he couldn't tell everything over there.
Q. I talked with him and asked him to tell me all he knew about the case, didn't I—him and old Aleck together? Answer that one question.
A. He doesn't answer the question.
Q. He refuses to answer the question, does he?
Mr. BARNES. Did he refuse to answer the question?
INTERPRETER. He didn't say anything.
341 The DISTRICT ATTORNEY. Tell him to answer the question.
A. He don't know whether to answer or not.
Q. Why don't he know whether to answer? He is my witness, and I had him brought here. Why don't he answer me? Ask him what relation he is to Hickory?
A. He says he isn't any.
Q. Is Aleck any relation to Hickory?
A. No, sir.
Q. Aleck brought him up, didn't he—raised him?
A. Yes, sir.
Q. Ask him why it is he didn't tell me about this when we talked about it?
A. He don't know whether he had a right to tell anything of that kind.
Q. Ask him if he wasn't in my office when Aaron told him what to do.
A. He says Aaron told him sometime previous to the time he was in your office.
Q. Why not tell me? Ask him if he wasn't in my office when Aaron was telling me what he knew about the case, when I had all the Government witnesses in my office, trying to find out about the case, getting ready.
A. Yes, sir; he knows that he was there.
Q. Ask him if I didn't send everybody out of the room, except him and Old Aleck and you, when I talked to him there, and talked to everybody else in their presence, Aleck and you and he and I. Why didn't he tell me?
A. He said he didn't make any statement about this case. The old man and him got through with their statements and went out.

Q. He told me there everything that he has stated here, with this exception. Ask him who he first told this to.

A. To Tom Kenner.

342 Q. When was that?

A. Last night.

(Witness excused.)

343 SAM HICKORY, one of the defendants, sworn in his own behalf and examined through Interpreter Walkingstick.

By Mr. REED. Ask his name.

A. Sam Hickory.

Q. Ask him where he lives.

A Tahlequah district.

Q. Tell him he knows the time of this killing. Where was he living?

A. In Tahlequah district. It is there at Aleck Stock's.

Q. How old is he?

A. 20 years now.

Q. Ask him if he has ever had any charges against him; and, if so, what they are.

The DISTRICT ATTORNEY. I don't think that is a proper question to ask.

The COURT. What is the purpose of that from this witness?

The DISTRICT ATTORNEY. That would come from me very properly.

Mr. REED. We ask it as testimony going to show his peaceable character. If the man never had any charges against him that would go to show it.

The COURT. I don't think you can show the peaceable character of your client in that way.

Mr. REED. Tell him now that he is charged with this crime of shooting Wilson. Tell him to tell where he was that day and what he was doing; if Wilson came to the house where he was living.

A. He was hauling rails on that day.

Q. What was he hauling them with?

A. With a wagon.

Q. Whose wagon did he have?

A. Aleck's.

Q. D'd he have a team?

A. Yes, sir.

Q. How many horses?

A. Two.

Q. Whose horses were they?

A. Aleck's.

Q. When did the marshal first come to him?

344 A. He said he was hauling rails. It was on Tuesday. It must have been about four o'clock that evening when he came to him.

Q. What did the marshal say to him? Tell him to tell everything he can remember.

A. He says he said, "Which road leads to Lewis Hawkins's?" and he told him, "That road there," and when he spoke again he says, "Is there any drinking water here?" and he told him, "Yes," and he got down and he came to where he was hitching up a team to a wagon, and he says, "I

believe I know you; your name is Sam Downing, isn't it?" and he told him "Yes," and he told him, "Then I put you under arrest for introducing whiskey." He told him, "All right," and then he commenced taking the harness off of the horses.

Q. Took the barness off of the horses, and then what?

A. And then after he unharnessed the horses he just turned them loose, and he said, "Ain't you going to ride one of them?" He says, "No; they don't belong to me." "Where is the owner of them?" he says, and he told him that the owner had gone, and he told him then to ride one of them as far as the house where he was, and if he wouldn't let him ride it he could bring it back, and he told him all right, and then he put the bridle on the horse, and then Wilson told him to hurry up and get the saddle, that it was getting very late and they must hurry and go, and he told him all right and started towards the house. When he was about three steps from the porch he heard a gun fire, and when he turned around that way he saw him with a revolver and saw the smoke coming out of it, and then he kept going towards the house, and then a second
345 shot was fired when he was just about the door, and then after that he run in the house and shut the door, and he was going to go out through the side-room door and run off, but after he had got about as far as the middle door of the side room there the marshal had gone around on the other side and come in through the front side-room door, and as he was coming through the door he had his pistol this way at him [indicating], and then he run back, and then he went and got his gun, and then he went to the front door, and then he went to the middle door, and then he said the marshal shot at him and then he shot at the marshal, and then both shot about the same time. He was standing around behind the wall a little and didn't have anything to help him any, and he opened the door and was going to go out. He says, "I run to go out this way to open the door, and just as I done that he shot at me, and then I had my gun raised and must have shot him that time, because he went back, and I just stayed in the house."

Q. Then what happened next?

A. He says he went to the door and saw him go near his horse and lay down; go down this way like; didn't fall down; just laid down.

Q. Where was marshal the laying down at?

A. Close to the wagon; east of the house.

Q. I want to know if, after the marshal shot the first time, he said, if I understood him, he was going with his back to the marshal when he first shot, and he looked around and saw the smoke after he first shot. Did he run then?

346 The DISTRICT ATTORNEY. That is certainly a leading question.

Mr. REED. Ask him what he done.

A. He was still walking.

Q. At that time?

A. Yes, sir.

Q. How many shots did the marshal fire before he got in the house, if he recollects?

A. Only two shots.

Q. Then he said he shut the door, I believe. Now, where was he when he seen the marshal next?

A. When he was coming in at the side-room door.

Q. Tell him to point where he was when he saw the marshal after he got the front door shut and started back through the house; where was he when he saw the marshal [handing witness diagram]?

A. He says he was at the middle door.

Q. Whereabouts was the marshal?

A. At that door [indicating side-room door].

Q. Coming in?

A. Yes, sir.

Q. How did he have his pistol?

A. In his hand.

Q. Ask him if the marshal said anything.

A. There was a woman standing right by there, and he said to the woman to get out of the way.

The DISTRICT ATTORNEY. Ollie?

A. Yes, sir.

Mr. REED. Was that all the marshal said during the fight?

A. Yes, sir; that is all he remembers of; all he heard.

Q. Then what did he do?

A. He says he run back to the corner of the house and got his gun.

347 Q. Where was his gun?

A. At the east corner of the house.

The DISTRICT ATTORNEY. That is in the front room?

A. Yes, sir; it is the front room.

Mr. REED. There is where the gun was?

A. Yes, sir.

Q. He got the gun. Where did he go from there?

A. He went to the front door.

Q. When he got to the front door, where did he see the marshal next?

A. He come to the middle door.

Q. Did the marshal come through the middle door during the fight any time?

A. No, sir; he was standing behind the door or wall.

Q. Behind the door or wall at the middle door?

A. Behind the wall; he was just out enough to shoot, he reckons, part of his breast.

Q. Does he mean that he just exposed part of his breast—about this much of his body?

A. Yes, sir; one side of his body.

Q. Where was he standing when the marshal shot the first time after he came to the door?

A. In the house there. He said he stood there at the front door. He was still there when he fired the second shot.

Q. He said that the marshal fired the first shot at him from this middle door. Then what did he do?

A. He said he didn't do anything; he was just standing there after he shot at him, and he shot at him then.

Q. Did he shoot at the marshal after the marshal shot as he
348 says, the first shot at the middle door?

A. Yes, sir.

Q. Then the second shot that was fired was his?
A. Yes, sir.
Q. What was done after that?
A. He says the marshal shot again.
Q. And then what?
A. He says he shot at the marshal.
Q. Does he know how many shots he shot in all?
A. He says he supposes he must have shot three shots.
Q. Does he know how many the marshal shot after he came in the house?
A. He says he must have shot three shots.
Q. After he came in the house?
A. Yes, sir.
Q. After that tell him to tell where he went, and where the marshal was—what was done after the marshal lay down.
A. Some time afterwards, he says he supposes it must have been about half an hour afterwards——
Q. What did he do?
A. He didn't do anything.
Q. How did he find the marshal; was he dead or alive?
A. He thought he was dead; he wasn't breathing.
Q. How did he lay?
A. His legs were like he was laying on his back, though he was turned over this way.
Q. What did he do?
A. He went up to the house.
Q. And then what did he do?
A. After he got back he was excited and scared and didn't know what to do, and he don't know just all he did do, and he put him on a wagon and hauled him off.
Q. Tell him to tell all. Tell him to tell how he done that. Ask him how he done it.
349 A. Hauled him off on a wagon; laid him on a wagon.
Q. Did he have the bed on the wagon, or without the bed.
A. Without the wagon bed.
Q. Tell him to describe how he put him on there.
A. Just picked him up and laid him on there; just laid him on the wagon, he says.
Q. How did he fix his body and legs? Tell him to describe that, too.
A. He don't know what he done; he was scared and excited.
Q. Did he put horses to the wagon?
A. Yes, sir.
Q. Tell him to tell all he did; how he got on there and how he got him away; tell him to describe it fully.
A. He says he took him to where he was found.
Q. On the wagon?
A. Yes, sir.
Q. What did he do with him after he got him there?
A. Didn't do anything; just put him off.
Q. Where did he put him?
A. Just a little piece there.

350 Q. Did his body stay on the wagon all the time until he got there?

A. Yes, sir; it fell off of the wagon once.

Q. How far had he gone when it fell off?

A. He was very near to the place.

Q. Ask him if he ever struck the man after he went to him and found him lying there; if he ever struck him in any way?

A. No, sir; he didn't do anything to him.

Q. Ask him then what he done, if he done anything, with his saddle or his pistol; tell him to tell it all?

A. He says, I just put the saddle away out in the woods somewhere; I reckon it must be there; I didn't take it from there.

Q. Was there any coat with the saddle?

A. Yes, sir; all just as it was tied to the saddle.

Q. The coat was tied to the saddle when he put it away?

A. Yes, sir.

Q. What did he do with the pistol?

A. I guess it is near there somewhere about, is what he says. He left it there; laid it down.

Q. Did he leave it there at that time?

A. Yes, sir.

Q. Where did he put it?

A. Out in the woods.

Q. Ask him if he took anything from the man, from the person of the man, out of his pockets?

A. No, sir; he says he didn't go into his pockets at all. He says, "If I had wanted to do that I would have taken his watch out; he had his watch in his pocket."

Q. Ask him if he done that by himself, if he moved him by himself?

A. Yes, sir.

Q. He says he done it by himself?

A. Yes, sir.

Q. What did he do with the team after he got through with it?

351 A. He says he turned it loose.

Q. Where did he take the wagon to?

A. Just took it back to its place where he always had it.

Q. Did he leave it just in the same fix that he used it in?

A. Yes, sir.

Q. When he took the wagon back did he leave it where it had stood before he hauled the man away?

A. Yes, sir.

Q. At the time that he hauled the man away was there anybody about there?

A. No, sir; he says he guesses, though, that the woman must have been around there somewhere.

Q. What had become of the woman, Ollie?

A. She had run away when she was told to get out of the way; had gone away.

Q. Did he see her afterwards?

A. Yes, sir; that night.

Q. What time?

A. He could not say just when.

Q. Where did they stay that night; if he staid with her, where did they stay?

A. Right close to Jim's house, under some apple trees.

Q. Ask him if he heard anybody about there that night?

A. Yes, sir; they came there.

Q. Where did they come to?

A. They first come to Aleck's.

Q. Then what did they do?

A. After they got there and asked him if he was asleep, then they came on to Jim's house.

Q. Then what?

A. After they came there they said the same thing, and when they found out there was nobody there he says he reckons they must have gone back.

Q. Ask him if he knows when Jim Squirrel got back home?

A. He says he reckons he must have got back about midnight;
352 he does not know exactly.

Q. Ask him what he did the next day?

A. He says he didn't do anything; he was around there.

Q. What did he do the second day, on Thursday?

A. I moved then, he says, under the advice of friends; they told me that I had better get out of the way, and then I went frommone place to another around.

Q. Ask him if on Wednesday, the next day after this killing, or any time after the killing, if he saw Tom Shade?

A. He says he didn't see him.

Q. Never saw him at no time?

A. No, sir.

Q. Ask him if he sent word by Big Aleck to Tom Shade to come to meet him?

A. No, sir; he says he don't know anything about that.

Q. Tell him now he has heard the testimony of Bryant; he talked in English, and I don't know whether he understood it or not; he has heard the testimony of Aaron Carey and Bryant Hughes about meeting him near his mother's in the woods, and having a talk with him; ask him to state if he had any talk with them.

A. Yes, sir; he says that he did hear them make that sort of a statement, but that it was not true; on that Sunday he says he was down at John Bigfeather's house.

Q. How far would that be from where these people were?

A. It must be about 8 or 9 miles west of there.

Q. Then on that Sunday he didn't see them or have any such talk with them?

A. No, sir.

Q. Did you ever see them at any time after this trouble?

A. No, sir; he didn't see them.

Q. Tel' him that he has heard this young boy, Jeff Osage, tes-
353 tify as to what he should have told him at Sanders's; ask him about that?

A. Yes, sir; he says that he has seen the boy, but he never had any such talk as that.

Q. Where did he see him?

A. He says he saw him at Bird Sander's. He says he passed along there.

Q. Tell him he has heard what Jeff Osage said that he, Hickory, said to him there about this killing.

A. Yes, sir; he says he heard it.

Q. Did he tell Jeff Osage what he heard Jeff testify to on the stand?

A. No, sir; I did not. He says that there was several there when he was talking, and if he has said that the others would be down here too, he guesses.

Q. There was several persons there at Sanders' when he saw Jef Osage?

A. Yes, sir.

Q. Several people around there?

A. Yes, sir.

Q. Did he have any talk with Jeff there?

A. No, sir; we didn't have any talk, only spoke to him, and he spoke to me, he says.

(Here the jury took a short recess.)

Q. Ask him if he knows what become of the marshal's horse.

A. No; he does not know what became of it, how it came to die, but then it was found close there dead.

Q. Did he notice it that evening after the shooting?

A. Yes, sir; late that evening he says he unsaddled him and taken the saddle off, and he was just standing right close there, and he was shot in the leg.

Q. He took the saddle and bridle off?

A. Yes, sir.

Q. When he did that he hid them as he has said, and when he
354 did that he discovered that he was shot in the leg?

A. Yes, sir.

Q. Ask him if he saw the saddle and bridle and coat after that at any time; if he went to look for them at any time to see where he put them.

A. He says he went by there in November and they were still there.

Q. The November after the shooting?

A. Yes, sir.

Q. The pistol and saddle were at the same place he put them, or how was that; was the pistol and saddle together or at different places?

A. Yes, sir; he says the pistol was there, too.

Q. Did he put the pistol there at the time that he put the saddle there, or did he put the pistol there afterwards?

A. Yes, sir; at the same time.

Cross-examination by the DISTRICT ATTORNEY:

Q. He is the man that hauled the body of the dead man off, is he?

A. Yes, sir.

Q. And threw it down in that gulch?

A. Yes, sir.

Q. Did he tie it on the wagon; how did he make it lie on just the running gears of the wagon?

A. He just laid him on.

Q. Ask him how the blood got into the wagon bed that was seen by so many people?

A. He don't know as to that.

Q. Who did he first tell about this—about hauling off that body?

A. He never did tell it until now.

Q. Never told his lawyers?

A. Yes, sir; he told his lawyers.

Q. When did he tell them?

A. He could not say just when; just after he employed these men he told them.

Q. Did he tell them before the trial of the case?

A. Yes, sir.

355 Q. Is he sure of that?

A. Yes, sir.

Q. How long before?

A. He says he could not say just when it was. Some time ago.

Q. Ask him if he had told Mr. Reed of this before the trial of the case—both gentlemen here.

A. He don't remember.

Q. He told his lawyers about it?

A. Yes, sir; he told them.

Q. Ask him if he understands English enough to understand what Mr. Reed told the jury when he was opening his case to them?

A. No, sir; he didn't.

Q. Ask him if he heard Mr. Reed tell the jury that it was true that he shot the marshal, but the marshal fired first at him, and after he shot the marshal that he saw the marshal run off, and that he himself ran off and don't know what became of the body, and that if somebody came there and moved the body afterwards he wasn't to blame for it? Ask him if he heard him say that to the jury; did he understand enough English to hear Mr. Read say that to the jury?

A. No, sir; he didn't understand Mr. Reed to say that.

Q. He don't understand enough English to know what he was saying?

A. No, sir.

Q. I suppose if he had heard Mr. Read tell the jury that, he would have corrected him, if it wasn't true?

A. He don't know.

Q. He did tell him a long time before that it wasn't true?

A. Yes, sir.

Q. If he could not understand English he could not correct him

356 and it wasn't his fault. Ask him if he ever told Big Aleck and Jim Squirrel about it?

A. No, sir; he never did tell them anything.

Q. Ask him if he didn't tell Big Aleck about this shooting, just about as he has told it now, and then tell him that after he shot the marshal, the marshal run off, and he never saw him any more. The day after the shooting, on Wednesday or on Thursday, at Big Aleck's house, ask him if he didn't tell Big Aleck that—tell him about the shooting just as he tells it here, except that——

A. He says no; he didn't tell him anything of that kind. He asked him, when he came home on Wednesday, what had happened that there was

so many bullets in the door, and he told him he reckoned it was the marshal came there yesterday, and he told him that he arrested him, and he went to kill him, and he had to defend himself.

Q. Didn't he tell Big Aleck that this marshal came there yesterday and asked him the way to Lewis Hawkins'?

A. He says he don't remember.

Q. Ask him if he didn't tell Big Aleck that he told the marshal that he didn't know, and then that the marshal put him under arrest?

A. He says he don't remember.

Q. Ask him if he didn't say that they both went in the house and got a drink of water, and after they went in the house and got a drink of water, if he didn't say that they went outside and sat on a log, and that the marshal then read the writ to him?

A. No, sir; he didn't tell him that.

Q. When he read the writ to him he asked the marshal what it was about, and he said it was for introducing four gallons of whiskey?

357 A. No, sir; he didn't have any such a talk as that.

Q. Then that the marshal told him he had to go with him, and he must go, and then it was while he was sitting out on the log that he told the marshal he was on foot, and the marshal told him to get a horse and ride it over to where Big Aleck was.

A. There was no log there——

Q. He denies that, does he?

A. Yes, sir.

Q. Ask him if, after that, he didn't tell Big Aleck that when he went in the house to get his saddle that the marshal fired at him just before he got to the door?

A. He says he don't remember anything of that kind.

Q. And then just as he got to the door the marshal fired another shot, and then told about the firing inside of the house, and then the marshal went off to his horse, and then he went off and he never saw the marshal any more?

A. No, sir; he says no; he went in that direction though, he said.

Q. Ask him if he didn't tell Jim Squirrel the same thing?

A. No, sir.

Q. He didn't talk to either one of these men about it then?

A. No, sir.

Q. Why?

A. He said he don't know why. They never asked him anything, is the reason, he guesses.

Q. Never told them anything about the killing at all?

A. No, sir; so far as he is concerned, he didn't tell them anything.

Q. Ask him what friends it was that told him to leave.

A. The neighbors.

358 Q. What neighbors told him to leave; who were they?

A. There was a good many there; pretty thickly settled.

Q. Why did they tell him to leave, if he never told them that he had killed the marshal?

A. On a suspicion, he supposes.

Q. He never told anybody about this killing, did he, until he told his lawyers about it?

A. Yes, sir.

Q. Does he answer that he did or that he didn't?

A. He says he never told anybody about the killing.

Q. Until he told his lawyers?

A. Yes, sir.

Q. Killed a man and hauled him off a mile and a half and threw him over at that place, and went on the scout, and never told anybody about it?

A. Yes, sir; he says he killed him and hauled him off, but he didn't go on the scout. He just went among the people there, from house to house.

Q. He said in his examination-in-chief that he went on the scout, and did it because his neighbors advised him to do it. He used the word 'scout'—at least you did. Why is he denying it now?

A. Well, he says he was just going from house to house.

Q. What was he going from house to house for?

A. Well, he don't know; he didn't know how to scout; he had never scouted any.

Q. What was he going from place to place for?

A. He don't know.

Q. He said that his neighbors advised him to leave there because they suspicioned him.

Mr. BARNES. He told you he left on suspicion. Ask him what that means.

359 The DISTRICT ATTORNEY. Anybody can tell what that means It was in reply to a question I put to him if he never told anybody about this, and how came him to leave, and he says that they advised him to leave on suspicion. Anybody can understand that that knows anything. (To the interpreter.) Tell him to go on.

A. Go on with what?

Q. Ask him how long he was at Tom Keener's?

A. About three days.

Q. Was he there any more than that time?

A. No, sir.

Q. What did he go to Tom Kenner's for?

A. Just on his rounds.

Q. Did he stay at any place more than three days, and, if so, where?

A. Yes, sir; sometimes he would stay about a week somewheres at the same house.

Q. Where did he stay as much as a week?

A. He says he staid a week at Big Feather's.

Q. Why didn't he stay longer at Tom's?

A. He couldn't give any reason for that.

Q. He can give no reason why he didn't stay longer. I don't suppose he was trying to keep away from the marshals, was he?

A. No, sir; he wasn't trying to keep away from the marshals. He knew that they wanted him, but then he wasn't trying to keep out of the way. If he had he would have went out in the woods.

Q. Then what was he doing?

A. Not anything.

Q. Why was he running around?

A. He could not give any reason for that; he was just going among his friends.

Q. If he hadn't done the killing would he have gone out that
360 way at that time?

A. That wasn't his first time he was ever out that way he says.

Q. Would he have gone out that way if he hadn't done that killing at that time?

A. He says he don't know.

Q. Why, he has already said that the reason he went was because his friends advised him to go on suspicion. It was on their advice that he went off this way.

A. He said if it hadn't been for them he would have given up the next day.

Q. Then he was on the scout. What is the reason that he says he wasn't keeping away from the marshals?

A. He says he thought they were grown people, and knew what they were talking about.

Q. Who was it that advised him to leave?

A. A man by the name of Josiah Pinton.

Q. Tom Kenner?

A. He don't know anything about him.

Q. Where was he when Tom came there after him?

A. He don't know of him coming after him.

Q. Where was it that Tom found him?

A. He didn't find him anywhere; he went to his house.

Q. That is the first time he had seen him?

A. Yes, sir.

Q. Where did he and Tom get together?

A. He says they got together at Andy's.

Q. What Andy's?

A. He don't know his other name; that is all he knows about it.

Q. Where was Tom?

A. He was there when he got there.

361 A. He was sitting down in the house.

Q. How far is that from Tom's place.

A. He don't know exactly, he says; it must be about three miles. He isn't well acquainted up there.

Q. Then did he and Tom go up to Tom's house?

A. No, sir.

Q. Then what did they do?

A. He just staid there, and Tom went back by himself to his home.

Q. Was that the first time he saw Tom after the killing?

A. This was the second time.

Q. When had he seen him before that?

A. At his house.

Q. At Tom's house?

A. Yes, sir.

Q. Is that the time he staid there three days when he first saw him there at his house?

A. Yes, sir.

Q. Where did he find him then?

A. Out in the field.
Q. How long after he left Tom was it that he saw Tom at Andy's?
A. It was a few days afterwards; he could not say how long.
Q. Where was he arrested.
A. Out in the Osage Nation.
Q. When did he go to the Osage Nation?
A. About the last of November.
Q. He went to the Osage Nation the last of November.
A. No, sir; that is when he was arrested.
Q. Is that it?
A. No, that is when he went out.
Q. How long was he in the Osage Nation before he was arrested?
A. He supposes he must have been there something over two months.
Q. Who arrested him?
A. Some of the citizens that lived there?
Q. Osages?
A. No, sir.
362 Q. White men?
A. Yes, sir.
Q. They caught him; caught him in a trap; trapped him, didn't they?
A. No, sir.
Q. How did they manage to arrest him?
A. They just came to where he was and arrested him.
Q. Some of the citizens there?
A. He don't know whether they were citizens or not; he says people that lived there.
Q. On the night of the killing, he slept under an apple tree. Who was it that came there that night?
A. He thought it was Hog Shooter from his talk.
Q. That is John Carey?
A. Yes, sir.
Q. And who else?
A. And his other two brothers.
Q. There were three of them. Were there three of them came there Tuesday night?
A. He could not say there were three; there may have been four.
Q. Did he go to them when they came there?
A. No, sir.
Q. Why?
A. He was afraid of them.
Q. What was he afraid about?
A. He was very much excited and scared that night.
Q. They are Cherokees, are they not?
A. He reckons they are.
Q. Ask him if he told his lawyers where this saddle and bridle and pistol were hid?
Mr. BARNES. I don't know that you have a right to ask that.
INTERPRETER. No, sir; he never told where they were.
The DISTRICT ATTORNEY. Has any effort been made to go and find them where he hid them?
A. He says he don't know.

363 Q. Where was he on the next day—Wednesday—from that time?

A. He says he was near around there, but didn't stay at the house all day, though. He came back there now and then.

Q. Who was at home when Hog Shooter—John Carey—was there, and the others?

A. Him and Ollie.

Q. Had Jim got home yet?

A. No, sir.

Q. Did he see his neighbors some in the next day—Wednesday?

A. There was nobody come on Wednesday.

Q. Did anybody come Wednesday night?

A. Yes, sir; Hog Shooter came there, and he reckons the other one.

Q. How many did he see on Wednesday night?

A. There must have been about two or three.

Q. Who were they?

A. He thought it was Hog Shooter. He was in the house and heard him talking, and thought it was him.

Q. He was in the house, was he?

A. Yes, sir.

Q. He swears to that—on Wednesday night, when Hog Shooter and Nugent were there?

A. He says he don't know who they were; he didn't see them; he heard Hog Shooter talking, though.

Q. Who was Hog Shooter talking to?

A. Aleck.

Q. That was Wednesday night?

A. Yes, sir.

Q. Was Jim Squirrel there?

A. Yes, sir; he was there.

Q. In the same room that he was in; both of them, he and Aleck, all in the same room when these marshals came?

A. The old men were on the outside.

Q. Were they on the outside just before they came up? They were all on the outside when they came up, were they not? Were they all

364 inside together before these men came up, Nugent, Carey, and *and* the others?

A. He says no.

Q. They were on the porch and he was on the inside?

A. There was no porch to Jim's house.

Q. That was at Jim's house, was it?

A. Yes, sir.

Q. Did they know he was in there, or was he hid?

A. He don't know whether they knew he was in there or not. They knew it afterwards, when they came in there and found him.

Q. How did he get in there without their knowing it?

A. Who?

Q. Him, himself. How did he get in Jim's house without him and Big Aleck knowing it?

A. He says he don't know; he might be in the*i*re without him knowing it.

Q. I asked him if Jim and Big Aleck knew he was there?

A. Yes, sir; he says they knew it because they saw him.

Q. Ask him if he hasn't heard them both swear upon the stand that he wasn't there at the time; that he left on Wednesday before noon, and that they never saw him afterwards.

Mr. BARNES. They didn't swear that. One of them swore he saw him in the afternoon, as well as at dinner.

The DISTRICT ATTORNEY. One swore that he left at noon, and he never saw him any more; and the other swore that he left at four o'clock.

Mr. BARNES. That is not the way you put it awhile ago.

The DISTRICT ATTORNEY. Didn't he hear them swear on the
365 stand, in his own language, that at the time he says he was in that house they say he had left there, and they never saw him any more?

A. Yes, sir; he knows they swore that.

Q. It is true that when Hog Shooter and Nugent were there he was in in the house?

A. Yes, sir; that is true.

Q. Ask him if on Friday he saw other people who came there; Thursday morning—next morning—ask him if he saw them there.

A. No, sir; he didn't see them; he says he wasn't at the house that day.

Q. When did he leave Jim's house?

A. He wasn't far away from there; he was just out in the orchard.

Q. When did he go out of Jim's house? He was there when Hog Shooter and Nugent rode up there Wednesday evening, and the two men were on the outside. When did he leave Jim's house, that night or the next morning?

A. Afterwhile, he says.

Q. How long after these men left?

A. He says they had been gone sometime—not very long, either.

Q. Half an hour?

A. He says he could not say as to that.

Q. Does he think he was in there as much as an hour and a half after Hog Shooter and Nugent left?

A. He says it may have been half an hour.

Q. Where was Ollie?

A. She was at her mother's.

Q. She wasn't in the house?

A. No, sir.

Q. Where did he go when he left Jim's house?

A. He didn't go anywhere; he was just close around there.

366 Q. Well, where was he?

A. Out in the apple orchard.

Q. Out in the apple orchard Wednesday night?

A. Yes, sir.

Q. Why didn't he sleep in the house?

A. He don't know why.

Q. Where was he the next night—Thursday night?

A. At John Big Feather's the next night.

Q. When did he go over to John Big Feather's; what night?

A. In the night.

Q. What night?

A. Thursday night.

Q. Wednesday night he staid out in the apple orchard, and all day Thursday; what was he doing then until Thursday night, when he went over to Big Feather's?

A. He wasn't doing anything; he was just walking around.

Q. Was he in the orchard under the apple trees?

A. Yes, sir.

Q. How far from the house?

A. Just close there.

Q. Ollie came over there on Thursday, didn't she?

A. Yes, sir; he says that Ollie came back to Aleck's on that day.

Q. What time?

A. He could not say just what time.

Q. What time did Ollie leave there on Thursday, if she left at all?

A. He just left her there; he don't know what time. When he went away he left her there.

Q. He left her there on Thursday night?

A. Yes, sir.

Q. All Thursday he was around home there somewhere?

A. Yes, sir.

Q. He heard her (Ollie) testify that on that day Tom Shade was over there; did he see him?

A. He didn't see him.

Q. He didn't see Tom?

A. No, sir.

Q. There was a big crowd of men came there on Thursday?

367 A. He says there was a good many; he didn't see them.

Q. What was the reason he didn't see them?

A. He says he could not see them; he could not see that far.

Q. How far?

A. He says he told you he was out a little piece.

Q. He has told me that he was close around all day Thursday. That is what he said?

A. He says that is true, that he was near around, but then he wasn't in sight of the house.

Q. How d'd he know that Ollie was there if he wasn't in sight of the house, and how does he know that he left her there?

A. He says he would sometimes go to the house.

Q. He would go up to the house sometimes?

A. He went there three times.

Q. Was he in the woods when he was out close around the house?

A. No, sir; he was in the orchard.

Q. How big an orchard is that? Ask him if there was over 15 trees in that orchard.

A. He says there must be about six acres of it, but he says there is some peach trees there too, and all other kind of trees.

Q. Then he came in to the house?

A. Yes, sir.

Q. Now, what time Thursday night did he go over to John Big Feather's.

A. He says he could not say what time he went over to Big Feather's; it was in the evening.

368 Q. He said night before?

A. In the evening, about night.

Q. He said he left late in the evening.

Ans. When he got there it was after dark. He says they told him there was a good many people there that day.

Q. Who told him that?

A. Ollie.

Q. Where was Jim and Aleck?

A. They were at the house; both at the house; they were sick.

Q. Didn't they say anything to him about the people being there?

A. He didn't have any talk with them.

Q. Did he see them?

A. Yes, sir.

Q. Did they see him?

A. He guesses so.

Q. I suppose he bid them good bye when he left, didn't he?

A. No, sir.

Q. Why didn't he bid them good by'?

A. He don't know.

Q. Didn't he tell them he was going?

A. No, sir.

Q. What is the reason he didn't tell them he was going?

A. He don't know why.

Q. He didn't tell them he was going, or bid them good bye?

A. He says no.

Q. He saw them, and they saw him on Thursday?

A. Yes, sir; he saw them; he don't know whether they saw him or not; he guesses they did.

Q. Where did he eat his breakfast, dinner, and supper on Thursday?

A. At that place.

Q. At whose house—Aleck's or Jim's?

A. Jim's house.

Q. Why didn't he eat at Aleck's?

369 A. He says they didn't cook there. They always cooked at Jim's house.

Q. Did the whole family eat there?

A. Yes, sir.

Q. Did Aleck and Jim eat there that day?

A. Yes, sir.

Q. With him at the same table?

A. Yes, sir.

Q. All ate at the same table on Thursday?

A. Yes, sir.

Q. Breakfast, dinner, and supper?

A. No, sir; he didn't eat his supper there on Thursday evening.

Q. Where did he eat?

A. At John Big Feather's.

Q. Did he eat dinner and breakfast there?

A. Yes, sir.

Q. He said Aleck and Jim both ate their breakfast and dinner there; I thought he said they were sick.

A. Yes, sir; they were sick. He says whenever anybody is sick they sometimes eat.

Q. It is true, notwithstanding they were sick, that they both ate dinner and breakfast?

A. Yes, sir.

Q. Was that the last time he saw Ollie when he left there?

A. Yes, sir.

Q. Was Ollie his wife?

A. Yes, sir.

Q. Was she at that time—that is, was he married to her?

A. No, sir.

Q. She wasn't his wife; she was just living with him?

A. Yes, sir.

Q. He said something awhile ago about his being but a boy. It seems as though he was old enough to have a girl to sleep with?

A. He supposes so; he don't know.

Q. Why didn't he go there and see Ollie occasionally when he was around there?

A. He says she was too far.

370 Q. He is the man that was far off. Ask him if he didn't love Ollie.

A. He don't know.

Q. He don't know whether he loved or not. She is a good-looking girl; he ought to love her, a man living with her and sleeping with her.

A. Yes, sir; it appears so.

Q. Didn't he love her?

A. He couldn't say.

Q. What was he sleeping with her for?

A. He couldn't say as to that.

Q. He wouldn't have a woman for a wife that he didn't love, would he?

A. He guesses that is so; he don't know.

Q. He just guesses that he loved her. He didn't love her enough to go to see her after he killed this marshal?

A. He guesses so; he don't know.

Q. He was afraid the marshals would catch him if he would go to her, wasn't he?

A. No, sir; he wasn't afraid of them.

Q. Did he see any crowd there—Mr. Paschal and Sunday Christy, and that crowd?

A. No, sir.

Q. What did he haul that dead marshal away and throw him down in that gulch and woods for?

A. He says he can't give any reason; he says he was scared.

Q. Did he tie him to the wagon?

A. No, sir.

Q. How did he put him on so he would stay over that rough and rocky road, as it has been shown to be?

A. Just laid him on.

Q. On what?

A. On the guide pole; on the hind end of the wagon, near the coupling pole, where it crosses.

Q. Would he hold the man with one hand and drive with the
371 other?

A. No, sir.

Q. Did he sit astraddle of him?

A. No, sir.

Q. Did he tie him?

A. No, sir.

Q. He says that he only fell off once in the miles and a half over the rough and rocky road. How is that?

A. He says he don't know.

Q. Did he double him up and let his head hang down on one side and his feet on the other, like a sack, so he would not fall off?

A. He says he don't know how you would double up a sack.

Q. Did he double up the man? It seems he knows more about dead men than he does about sacks.

A. No, sir.

Q. How did he lay him on so he would not fall off?

A. He says he don't know.

Q. Did he lay him lengthwise or crosswise?

A. Lengthwise.

Q. Lengthwise of the wagon?

A. Yes, sir.

Q. Head towards the front wheels or hind wheels?

A. He says he guesses it must have been behind.

Q. Tell him not to guess, but to tell. He says he hauled him lengthwise, with his head towards the front wheels or hind wheels, or how?

A. Behind, he says.

Q. Feet towards the front wheels?

A. Yes, sir; he r'ekons so.

Q. Tell him I don't want him to guess about it. He knows.

A. He says he don't know for sure; he was excited and scared.

372 Q. It seems that when he goes to talking of hauling the dead man out there, he don't know much about it. Tell him I want to know, if he is certain that he put that corpse on that wagon, how he put it. He knows whether the head was towards the front wheels or not.

A. He said his feet was towards the front of the wagon.

Q. What were his feet laying on at the front end of the wagon; there are no hounds that reach that far ahead. Ask him this question first: Which was the body of the man nearest to, the front wheels or hind wheels?

A. About midway; he says he was on the coupling poles.

Q. About middle ways of the coupling poles?

A. Yes, sir.

Q. If he was about midways and on the coupling poles, what was it that held him on?

A. He says he don't know. He laid there all right enough, he says.

Q. Ask him if he has ever seen a man lay a log on the pole between the wheels without using a log chain or twisting it around to hold it there?

A. No, sir; he never seen it.
Q. He had two horses, did he?
A. Yes, sir.
Q. Did he drive fast or slow?
A. Slow.
Q. What did he drive slow for?
A. He don't know.
Q. Did he whistle as he went along, or sing?
A. No, sir.
Q. Did he have any lines to the horses, or was he just driving them by word of mouth—by gee-haw?
A. He had hold of the lines.
Q. Ask him what became of the dead man's belt that he wore around him that had cartridges in it?
373 A. It must have been on the saddle; it was tied to the saddle.
Q. The belt that had the cartridges in it?
A. Yes, sir.
Q. What became of that?
A. He says he don't know what become of it.
Q. Big Aleck says that one of his horses was gone when he came home; ask him if he rode it off.
A. No, sir.
Q. How did he get the body up on the wagon?
A. Just picked it up himself.
Q. Picked it up himself and laid it on the poles?
A. Yes, sir.
Q. Just took it and laid it on the coupling poles himself?
A. Yes, sir.
Q. How did the man look when he was doing that—the dead man?
A. He says he never noticed how he did look.
Q. Did he get any blood on him?
A. He guesses his hands did.
Q. Did he get any blood on his clothes?
A. He says he don't recollect as to that; he says he didn't touch him much.
Q. How did he get him up if he didn't touch him; how did he left up a limber dead man and place him on the coupling pole of a wagon if he didn't touch him much?
A. He took his arms.
Q. Did he take him by the hair of the head and the seat of the britches and raise him up at arms' length?
A. He says he don't know.
Q. How did he get him up?
A. He picked him up and putt him on.
Q. He put him on the second time?
A. Yes, sir.
Q. How does he say he took him off when he put him off?
374 A. He just took hold of him.
Q. Did he carry him down that hill or roll him down like a log?
A. He carried him down.

Q. Why didn't he carry him all the way down?
A. He don't know why.
Q. How far was the wagon away from the place where he carried him?
A. Just on the the hill.
Q. How far from the place where he carried him?
A. 20 or 30 steps. A. No that far, he guesses.
Q. About how far; was it the length of this room?
A. No, sir; he guesses it must have been about 12 or 15 steps.
Q. How did he carry him?
A. He just carried him.
Q. On his back or in his arms?
A. In his arms.
Q. Get any blood on his clothes?
A. No, sir; only on his hands.
Q. How did he avoid getting blood on his clothes if he put the man on the wagon twice and took him off and carried it 12 or 15 steps?
A. He don't know why, he says.
Q. Even the pocketbook and all these papers look bloody. The man bled that much. How did he manage to handle him so much without getting blood on him?
A. He don't know why; he can't give any reason.
Q. How was the man left there; which way was his head?
A. His head was towards the west—lying west.
Q. Was he lodged on a little bush; did he lay him against a lit-
375 tle bush so the bush would hold him and keep him from rolling down.
A. He says he thinks there was a bush there; he never noticed.
Q. Did he take him all the way down to the bottom?
A. No, sir.
Q. Why not; the body would be harder to find if he put it all the way down than to put it where he did?
A. He says he don't know why?
Q. What did he cut the horse's throat for?
A. He says he didn't cut the horse's throat?
Q. Who did?
A. He says he don't know.
Q. He admits that he stripped the horse of the saddle and bridle?
A. Yes, sir.
Q. Ask him when he told the marshal that he was going to get his saddle to ride, was it him that said he would go and get the saddle, or did the marshal tell him to go and get it?
A. No; he said the marshal told him to go and get a saddle.
Q. When he told him to go and get the saddle, he just walked off quietly towards the house?
A. Yes, sir; just went to get the saddle?
Q. What did the marshal shoot at him for when he was just going to get a saddle when the marshal had told him to get it?
A. He says he don't know the reason for that.
Q. He didn't run, did he?
A. No, sir.
Q. He didn't walk fast?

A. No, sir; he didn't walk very fast.

Q. He didn't get a gun?

A. No, sir.

Q. Didn't do anything to make the marshal shoot at him?

A. No, sir.

376 Q. Then he looked around and saw the smoke, and then started to walk towards the door, after the first shot was fired, I believe you say?

A. Yes, sir.

Q. Did he walk fast or run; he said he walked about two steps when the marshal fired at him again?

A. He walked the same pace, right on towards the house.

Q. Went about two steps, I believe he said, and then the marshal fired at him the second shot?

Mr. BARNES. I didn't understand it that way.

The INTERPRETER. He says he never said he had gone so many steps when he fired the second shot; he says he was near the door.

The DISTRICT ATTORNEY. When the first shot was fired, he has stated th't he was about two steps from the door, didn't he?

A. Yes, sir; he said when the first shot fired he was about two or three steps from the porch.

Q. You interpreted it door before; may be you were mistaken; he may correct his mistakes; he says he was about two steps from the porch when the first shot was fired; where was he when the second shot fired?

A. He was out near the door.

Q. How many steps had he taken?

A. He could not say as to that.

Q. How near the door was he?

A. He guesses it must have been about a step.

Q. On the porch, was he?

A. Yes, sir.

Q. About one step from the door?

A. Yes, sir.

377 Q. How wide is the porch, six feet?

A. Seven feet wide.

Q. Now, he says he walked quietly towards the door after the first shot was fired?

A. Yes, sir.

Q. Didn't run?

A. No, sir.

Q. Why didn't he run?

A. He don't know why.

Q. What did the marshal fire the second shot for when he was still walking quietly towards the door? Can he give any reason for that? Now, he says that the marshal didn't say anything; is that right?

A. Yes, sir.

Q. He didn't say hold up, or stop, come back here.

A. No, sir.

Q. He just told him to go get his saddle, and then while he was going to get it, shot at him twice before he got to the house, and he was still doing what the marshal told him to do, and the marshal didn't tell him to stop, or anything of that kind?

A. No, sir.
Q. Was he and the marshal good friends?
A. He says he don't know; he had never seen him before.
Q. He and the marshal were entire strangers?
A. Yes, sir.
Q. What did he shoot at him for?
A. He says he can't account for that, but he knows that he did nothing to induce the marshal to shoot, and that the marshal had said nothing to him to lead to anything of the kind.

Redirect examination:

Mr. BARNES. Tell him that he said in his examination in chief that he ran in and shut the door; ask him when that was. Did he
378 do that after the first shot, or the second shot?
A. Run in after the second shot.
The COURT. Did you ask the witness about that wagon sheet?

Recross examination:

The DISTRICT ATTORNEY. How did the blood get on that wagon sheet?
A. He says he don't know anything about that.
Q. Did the marshal go into the front room?
A. No, sir.
Q. The wagon sheet was in the front room, wasn't it?
A. He says it was in the side room at that time.
Q. How did it get into the front room?
A. He says he don't know about that.
Q. How does he know it was in the side room if he doesn't know how it got into the front room? Did he see it when it got back in the front om? Does he know how it came to get there so quick?
A. No, sir.
Q. Ask him if he knows how the blood came to get into the wagon bed.
A. No, sir.
Q. Ask him if he knows how the blood got on the ax.
A. No, sir; he don't know anything about that.
Q. Who turned these planks upside down in the back room?
A. He don't know about that either.
Q. Ask him if the marshal fired any shots through the back window.
A. No, sir.
379 Q. Ask him if he hasn't told—I can't ask him that, because I must get the names of the witnesses. He says that the marshal dind't fire through the window?
A. Yes, sir.

Redirect examination:

Mr. BARNES. Ask him if when that body fell off of the wagon, if he put it back on the same way that it was before it fell off.
A. He said when he put him up again, he laid him the other way—rossways.
Q. Does he remember how his legs were at that time?
A. No, sir; he says his legs the second time was where his head was the first time.
The DISTRICT ATTORNEY. Then he couldn't have laid him crossways.

INTERPRETER. He says he just turned him around.
Q. Turned him around the other way?
A. Yes, sir.
Q. Didn't lay him crossways, them?
A. No, sir.
Q. Did he do the driving?
A. Yes, sir.
Q. Who held the man on the wagon when he drove?
A. Nobody.
Q. He has put it in such a way as that it is impossible for that body to stay on there?
Mr. BARNES. I object to that question; that is a matter of argument
INTERPRETER. There wasn't anybody holding him.
(Witness excused.)

Here court took a recess until 1:30 this afternoon.

380 AFTERNOON SESSION, 1:30 p. m.

TOM SHADE, sworn in his own behalf, and examined, and testified as follows, to wit:
By Mr. REED: What is your name?
A. Thomas Shade.
Q. How old are you?
A. 22 years old, going on 23.
Q. Where do you live when you are at home?
A. In Tahlequah district, seven miles from Tahlequah.
Q. Who did you live with before this trouble?
A. With my father.
Q. When were you arrested, do you recollect?
A. I was arrested on the 30th day of September.
Q. When were you brought to Fort Smith?
A. I was brought to Fort Smith on the 6th day of October.
Q. You have been here ever since?
A. Yes, sir.
Q. You may state in that connection how you were arrested, if you went to the marshal's and gave up.
A. Yes, sir. Yes, I heard that they had me implicated, charged being in such a thing, and I told my father to go to town to see Boudinot to see if it was true, and if it was I would go down and give up if they wanted me to, and he went Tuesday and came back in the evening, and he said that was what he could hear, that they had me implicated in the charge; and I just told him that I would go down in the morning, and he said all right, and so that following day I went down.
381 Q. Did you go to see anybody when you got there?
A. Yes, sir; I went to see Boudinot.
Q. What did you do?
A. Me and Boudinot then, and father, and uncle all went to where Dave Rusk was, and he arrested me. Boudinot told him that I had come to surrender.
Q. You went and put yourself in charge of the marshal?

A. Yes, sir.

Q. You have been there ever since?

A. Yes, sir.

Q. You have heard that Wilson was killed out there, and heard all about it. Where were you then?

Q. Take the Monday of that week or Sunday, where were you? Or take Saturday before, where were you?

A. I left home Saturday morning.

Q Where did you go to?

A. I went three miles below Blue Springs schoolhouse to a man named Unick, and stayed there until Monday morning, when I went over to Uncle Isaak's.

Q. Was the fellow named Unick?

A. Yes, sir.

Q. Near the Blue Springs schoolhouse?

A. Yes, sir; about three miles below there.

Q. You stayed there until Monday?

A. Yes, sir.

Q. Where did you go then?

A. I went to my uncle Isaac's, and got there about five o'clock, and stayed there all night, and the next morning me and my wife and my uncle and his family all together went down to the town of Tahlequah, and there was another fellow, John Rat, went along.

Q. Is John Rat the witness you have applied for in this case?

382 A. Yes, sir.

Q. Do you know where he is?

A. I don't know now; I don't know; if I did I would have him here.

Q. Have you made any effort to get him?

A. Yes, sir.

Q. Have you had a subpœna issued for him?

A. Yes, sir.

Q. How long did you stay in Tahlequah?

A. We stayed in Tahlequah Tuesday until about five o'clock, and me and John Rat and my wife got together, and we went to John Johnson's and staid all night. Wednesday morning I went back down to town again, and I stayed there all day, along until maybe nearly sundown, and I came back to John Johnson's that night.

Q. Who was with you at Tahlequah on Wednesday?

A. John Rat was with me on Wednesday.

Q. Did you see your uncle Isaac there?

A. Yes, sir; I saw him there; uncle Isaac lives right on the public road.

Q. Explain how it is if you passed there; tell it all.

A. We passed right by the house to go to town, and I saw him at the house first in the morning.

Q. On what morning?

A. Wednesday morning; and then after I got to toen, about three or four o'clock, I saw him in town.

Q. And then what? You stayed there until evening, you say?

A. Yes, sir; me and John Rat left and went back to John Johnson's, and stayed there all night.

Q. Did you pass your uncle Isaac's going back?

A. No, sir; we went around the other road, a nearer way, that
383 evening to go back. John Rat was with me all the time.

Q. What did you do Thursday?

A. Thursday morning I goes to my aunt's, Mrs. Welch's.

Q. Where was that?

A. That was about four miles west of John Johnson's.

Q. What were you doing during the day Thursday? If you went anywhere to see anybody, tell about that.

A. Just before I got there on Thursday morning I met Joe Keener and Nugent.

Q. That is the young man that is a witness?

A. Yes, sir.

Q. That was on Thursday?

A. Yes, sir.

Q. Where did you meet them—where Neal tells about?

A. Yes, sir; I was about 150 yards from the house.

A. Jo Kenner?

A. Yes, sir.

Q. And Neal Nugent?

A. Yes, sir.

Q. What was you doing at the time?

A. I was going up to the house when I met them.

Q. Welch's?

A. Yes, sir.

Q. That same Welch they speak of?

A. Yes, sir.

Q. You say that was on Thursday morning?

A. Yes, sir.

Q. That you went to Welch's; and then where?

A. I went to Mrs. Welch's, and staid there until about 12, and John Welch and another fellow that lived there, he had been off down to some neighbors there, and he heard of this occurrence, and he came back home, and he asked me if I had heard any such thing, and I told him no, and he told me about it; and I stayed there until about one o'clock that day,
and I thought I would go over there and see about it; and I goes
384 over to Aleck Stocks, and I get there tolerable late.

Q. Did you have any gun with you?

A. No, sir; I never had any gun; I didn't see anybody at the house but Ollie.

Q. What did you do?

A. I got down off my horse, and she was setting by the side of the door, as well as I remember. I got up to the porch and I spoke to her, and I told her good evening, and she answered me, and I asked her if she was well, and she asked me if I was well, and I told her yes, and I asked her where Sam was, and she said she didn't know, and I stood around there a good little bit.

Q. Did you ask her anything more?

A. No, sir.

Q. Did you try to find out where he was?

A. Yes, sir; I asked her several times where Sam was, and she kept telling me she didn't know; so I thought she wouldn't tell me where he was, and I got on my horse and goes back, and goes to John Johnson's that night, and stayed all night.

Q. That was on Thursday night?

A. Yes, sir. Friday morning I leaves John Johnson's and goes to this fellow Unick's. How I come to go back again to my aunt Sarah's, I promosed John I would be back again that day, and him and me would go out on the prairie; and he said all right. I went out to this fellow Unick's, and while I was there this fellow was fixing to leave to go out west to some of the neighbors, and I says I believe I will go on Friday on the other creek, and will take the gun with me, if he didn't
385 care. That was on Friday morning; and he said, "All right, bring it back," and asked me if I was going to come back that night, and I said yes; and he said to bring it back that night, and I said I would; and I takes the gun and goes on over there, and when I got to 14-Mile Creek—that was Friday morning—when I got there, just two or three hundred yards below John Harlow's I met John Carey and a crowd of them going up the creek.

Q. These men that were out hunting, that are spoken of here, are the same men?

A. Yes, sir. I never said anything, only spoke to Squirrel Carey, and said good morning. This was all they said. I passed them and they passed me.

Q. If you saw John Carey's wife in passing there, when was that?

A. When I passed there, that was on Friday evening after I left my Aunt Sarah's.

Q. Did you see her Thursday, or did you go by there Thursday?

A. I never went right by the house.

Q. Did you go in sight of the house?

A. I am not certain whether it is in sight or not, where the wagon road runs or not.

Q. You went near there?

A. Yes, sir.

Q. When was it you went near there?

A. Friday evening I passed along by the house.

Q. Did you talk to her?

A. Yes, sir; I spoke to her.

Q. Did you have a talk with her?

386 A. No, sir; I never got off my horse.

Q. How long did you stay there?

A. I stayed there about 25 minutes, maybe, and maybe longer.

Q Do you recollect what you talked about? Did you talk about Sam?

A. I don't remember what we was talking about; anyhow some way Sam's name came up.

Q. Just go on and tell it as near as you can.

A. It come up some way; I don't remember exactly what we were talking about, and I told her that Sam was a friend of mine, and I was a friend of Sam's, and that is all I remember of saying to her about Sam at all.

387 Q. Thursday when you were going around there you went near the house; you don't know whether she could see you pass from the road or not?

A. No, sir; I don't remember whether the road is in sight of the house or not, because the house is standing in the timber. It is pretty brushy around the house.

Q. Which way were you going then?

A. I was going west.

Q. That was Friday evening, then, that you were up by Mrs. Carey's?

A. Yes, sir; it was Friday evening. I came right by.

Q. What coat did you have on?

A. I had on kind of a brown looking coat.

Q. Did you ever have this marshal's coat, or see it, or know anything about it?

A. No, sir; I don't know anything about it.

Q. Before you left there did you shoot off your gun?

A. No, sir; there was but six cartridges in the gun when I got it, and when I returned it there was six cartridges in it.

Q. Did you see Sam when you left there?

A. No, sir.

Q. I will ask you if you ever saw Sam, or did you ever see Sam after that killing is said to have occurred, up to the time of your arrest?

A. No, sir.

Q. From the time the killing occurred up to the time of your arrest, did you ever see Sam?

A. No, sir; I left John Johnson's that Saturday morning, and went home Saturday. I got home Saturday evening.

Q. What time did you leave Johnson's?

A. I left Johnson's in the morning; tolerable early Saturday morning.

Q. Where did you go to from there?

A. I went to my father's.

Q. Went back where you belonged?

A. Yes, sir.

388 Q. Back home?

A. Yes, sir.

Q. What relation are you to John Johnson?

A. John Johnson's wife and my wife are sisters.

Q. You spoke of on Thursday learning or hearing of this thing, of some trouble there?

A. Yes, sir.

Q. Was that the first you had learned of it?

A. Yes, sir.

Q. You had learned that from John Welch, who had heard it somewhere in the neighborhood?

A. Yes, sir; I had heard it of John Welch, and he had heard it from Charlie Coleridge, and he heard it from John Carey; that is how I came to get it.

Q. That was Thursday, some time in the day?

A. Yes, sir; Thursday morning.

Q. Mrs. Welch was your aunt?

A. Yes, sir.

Q. You know this man Aleck Stock?

A. Yes, sir.

Q. Did he ever come for you and give you any communication that Sam here wanted you—that he was in trouble, or anything of that kind?

A. No, sir.

Q. If you spoke of that to Mr. Paschal, tell how it came up?

A. No, sir; I don't remember of saying to Mr. Paschal that Aleck had come to give me any information for Sam. I remember saying to Mr. Paschal that I was in that part of the country at this time, even that we was over to the Blue Springs schoolhouse, but as far as telling him that Aleck had give me any information, I don't remember.

Q. Did he ever give you any information?

A. No, sir; he did not.

389 Q. How far was it from the Blue Springs school house to the place where you went from; was it in that neighborhood, either Welch's or Johnson's?

A. It was about six miles from Welch's; it is about two miles from Johnson's.

Q. How far would it be from Aleck Stock's?

A. It would be about eight miles.

Q. How far is Johnson's from Aleck Stock's?

A. It is about nine or ten miles; I don't know exactly how far it is; it is a good distance, I know.

Q. I will ask you if you had anything to do with the killing of this man Wilson in any way?

A. No, sir.

Q. Did you knock him in the head?

A. No, sir.

Q. Were you there when anybody else did anything of that kind?

A. No, sir; I didn't know anything about it; never seen nothing.

Q. You have heard the statement of Tom Galcatcher that you made in the camp, under arrest there. Were you there under arrest?

A. Yes, sir; I was there under arrest.

Q. Was Tom Galcatcher a guard there?

A. Yes, sir; he was a guard; I suppose he was; he had a gun there.

Q. Did he guard you there one night?

A. Yes, sir; I think so.

Q. On that night, if you were chained to anybody who was it?

A. I was chained to Aleck Stock.

Q. What was done there that night; what was going on?

A. There was nothing going on that I could see. Old Aleck was kind of puny, and me and him was laying down.

390 Q. Did you tell Tom Galcatcher what he has said you sai', in substance, that Sam here had shot the marshal, or wounded him, and that he didn't die, and you went over there, and that he wanted a drink of water, and you made some statements to him, and took an axe and killed him?

A. No, sir; I never made any such a statement to anybody.

Q. You say it is not true?

A. Yes, sir; it is not true.

Q. What were you talking about there; do you remember—that is, if you were awake and talking?

A. I was awake for some time in the night, but I don't remember how long I was awake. When I was awake I don't remember saying anything to anybody about the case or charge they had me there for, what they had me charged with; I don't remember saying anything to anybody about that.

Q. About how far was it from John Johnson's to Tahlequah?

A. About ten miles.

Q. Going by your uncle's?

A. Yes, sir.

Q. How far would it be from your uncle's to town?

A. Five miles; that is what they call it.

Cross-examination by the DISTRICT ATTORNEY:

You deny telling Galcatcher you helped to do this?

A. Yes, sir; I deny it.

Q. You deny telling Mr. Paschal that Big Aleck had come over to see you?

A. Yes, sir; I don't remember telling Mr. Paschal that.

Q. Told you that Hickory was in trouble and you went over and met Hickory at the Blue Springs schoolhouse?

A. I don't remember telling him that.

Q. Did you tell him that?

A. No, sir; I never.

Q. Wasn't Paschal out there, and didn't he have the chains
391 taken off of you?

A. Yes, sir; he came out there.

Q. You did have a talk with him?

A. Yes, sir; I believe I did speak a word or two to him.

Q. Made a statement to him, and told him you were in there in that neighborhood, did you?

A. I told him I had been over that way.

Q. Did you tell him you were in that neighborhood during the time of the shooting?

A. I told him I wasn't down there during the time of the shooting.

Q. You said awhile ago that you told Mr. Paschal at the time this thing was going on you were over there in that neighborhood.

A. Yes, sir; I had been over that way.

Q. On Saturday you left home, your father's house?

A. Yes, sir.

Q. Went where?

A. I went to a fellow's named Unicks.

Q. On Monday you went from Unicks to Johnson's?

A. To my uncle Isaac's.

Q. From there to Johnson's?

A. From there to town.

Q. And from there to Johnson's?

A. Yes, sir.

Q. And staid all night there Tuesday night?

A. Yes, sir.

Q. Wednesday night?
A. Yes, sir.
Q. Thursday night?
A. Yes, sir.
Q. And staid all night at Johnson's Friday night?
A. Yes, sir.
Q. Tuesday, Wednesday, Thursday, and Friday nights?
A. Yes, sir.
Q. Johnson married your wife's sister?
A. Yes, sir.
Q. Is he a friend or an enemy of yours?
A. He has been a friend to me all the time.
Q. You heard him state upon the stand you didn't stay there?
392 A. Yes, sir; I heard him say that.
Q. You heard him state that you left Tuesday, and never came back until Friday?
A. Yes, sir.
Q. That is not true?
A. No, sir; because me and John Rat were there together, and if I could have got John Rat here I would prove it.
Q. You got Johnson to prove that, and he proved you wasn't there.
A. I think he is mistaken about that.
Q. Was Johnson with you at Tahlequah on Tuesday and Wednesday?
A. No, sir.
Q. Were you at Tahlequah on Wednesday?
A. Yes, sir; I was at Tahlequah on Wednesday.
Q. You say that you staid at Johnson's all these nights?
A. Yes, sir.
Q. Where were you during the daytime, at home?
A. No, sir; I was in town Tuesday and Wednesday, and Thursday went to my aunt's.
Q. What did you go to town for Tuesday and Wednesday?
A. Tuesday my uncle——
Q. When you lived at Tom Shades you lived in five miles of town?
A. I didn't live at Tom Shades.
Q. You lived at Joe Shades; you lived in five miles of town?
A. Seven miles of town.
Q. When you went to Johnson's you were in ten miles of town?
A. Yes, sir.
Q. Why did you go away over there to Johnson's, and then go from there to town every day?
393 A. My wife hadn't seen her folks for a long time, and I didn't have nothing to do, and I went to town when I felt like going.
Q. Were you at home at Johnson's during any part of the time Tuesday?
A. No, sir.
Q. Wednesday?
A. No, sir; only in the morning.
Q. Thursday?
A. No, sir.
Q. On Friday?

A. No, sir.
Q. Where did you get your breakfast on Wednesday morning?
A. I got my breakfast at John Johnson's.
Q. On Thursday morning?
A. I got breakfast at the same place.
Q. Friday morning?
A. Same place.
Q. Where did you get supper on these days?
A. I got supper Thursday and Friday there; yes, sir; I got supper all the time there, only I got dinner——
Q. I am not talking about dinner.
A. I got supper there at the same place.
Q. At Johnson's?
A. Yes, sir.
Q. Wednesday and Thursday and Friday you got your breakfast and supper at Johnson's?
A. Yes, sir.
Q. Where did you get your dinner on Wednesday?
A. I never got any dinner at all. I didn't have any at all; we didn't eat in town.
Q. Where did you get your dinner on Thursday?
A. At my Aunt Sarah's—Mrs. Welch.
Q. Where did you get your dinner on Friday?
A. At the same place.
394 Q. Is she here, or anybody from her house?
A. No, sir.
Q. Now, then, you got your breakfast and supper and staid all night Wednesday—Tuesday night you staid all night, and got your breakfast Wednesday morning and Wednesday night at Johnson's?
A. Yes, sir.
Q. And staid all night Wednesday night, and got breakfast on Thursday morning, and supper Thursday night?
A. Yes, sir.
Q. Staid all night Thursday night and Friday morning got your breakfast, and on Friday night got your supper at Johnson's?
A. Yes, sir.
Q. And then left Johnson's that night?
A. I staid all night Friday night.
Q. And got your breakfast Saturday morning?
A. Yes, sir.
Q. Now, then, who all were there at Johnson's besides John Rat?
A. There was nobody there.
Q. Johnson's wife was there, wasn't she?
A. Yes, sir.
Q. Where is she?
A. I guess she is at home.
Q. Johnson was there?
A. Yes, sir.
Q. Johnson is another man who is not telling the truth in this matter.
A. No; he is mistaken about what he says.

Q. If he says that you came there Tuesday, and brought your wife, and left on that night, and didn't come back again until Friday night after-supper, is that true or false?

A. I came there Tuesday night, and I staid there every night until Friday night.

Q. Your own brother-in-law isn't telling the truth on you.

A. No, sir.

Q. Lied about you?

395 A. I don't know that he lied; I guess he made a mistake about it. I don't think he is lying.

Q. He was there?

A. Yes, sir.

Q. He knows?

A. He ought to.

Q. And he is your brother-in-law?

A. Yes, sir.

Q. And he has nothing against you?

A. Nothing; not as I know of.

Q. Do you remember what time it was that Johnson was on the stand and testified about that; was it Saturday?

A. Saturday, I believe.

Q. What day is this—Tuesday?

A. Yes, sir.

Q. You haven't sent for his wife, have you?

A. No, sir.

Q. Have you anybody else that knows where you were during these days except Johnson?

A. All these nights that I stayed there John Rat is about the only one that knows. I applied for him and the court could not find him.

Q. Is John Rat a Cherokee?

A. Yes, sir.

Q. It looks like you ought to be able to find him. Hasn't John Rat been here?

A. No, sir; he hasn't been here; or if he has I don't know it.

Q. That is the way you put that?

A. Yes, sir.

Q. You account for yourself as being at Johnson's during these times?

A. Yes, sir.

Q. Johnson is here and says you were not there.

A. Yes, sir.

Q. You admit seeing Mrs. Carey on Friday evening?

A. Yes, sir; I seen her Friday evening.

396 Q. You admit having that talk here, in which something was said about Hickory?

A. Yes, sir.

Q. You deny that you shot off your pistol and met Hickory out in the woods and rode off with him?

A. Yes, sir; I deny that.

Q. Did you hear a pistol fire off when you rode down there?

A. Not as I recollect of. I don't recollect hearing any pistol at all, or anything of that kind.

Q. Did you have a talk with Squirrel Carey when you met him—you admit meeting him, I believe?

A. No, sir; I just spoke to him and rode on. I just passed him.

Q. Did you shoot off your pistol that night?

A. No, sir; I never shot off my pistol that morning.

Q. You had one to shoot, didn't you?

A. I had the same gun that I had when I passed Mrs. Carey's. It was on Friday morning when I met them.

Q. A pistol or gun?

A. It was a gun.

Q. Why did you say you didn't shoot off your pistol if you didn't have any; why didn't you tell me you didn't have any pistol?

(No response.)

Q. Is Bill Triplett here; you brought him here *is* a witness, didn't you?

A. No, sir; he is one of Sam's witnesses, if I am not mistaken.

Q. He hasn't been put on the stand?

A. No, sir.

Q. I will ask you if you didn't have a saddle that belonged to this marshal and take it to Triplett's and leave it there?

A. No, sir.

Q. You deny that?

A. Yes, sir.

397 Q. The only thing you have to say about this is that these things these people have been testifying about is not true, and that you were at Johnson's at the time these things occurred?

A. I was in town in the daytime them two days, and every night I would go to Johnson's.

Q. You admit going there Thursday—over to Carey's?

A. Yes, sir.

Q. What were you there for?

A. I just heard that this thing happened, that John Carey said he heard there was a man killed over there, and I thought I would go over there.

Q. Did you see any crowd that went there—Paschal and his crowd?

A. No, sir; it was late in the evening.

Q. Not Paschal, but the other crowd—Carey's crowd?

A. No, sir; it was late in the evening when I got there.

Q. Did you see anybody but Ollie?

A. That is all I seen.

Q. How did you manage to slip in and slip out without anybody seeing you?

A. I never slipped in and slipped out.

Q. You managed to go in and go out without seeing anybody but Ollie?

A. I just rode up.

Q. These other people rode up, and they saw somebody else?

A. I did't see them.

Q. You didn't go to help hunt that body?

A. No, sir.

Q. Why didn't you go with the rest of them and help hunt it?

A. I never knew anything about it; didn't hear that the man was gone or anything about it that day; they had done found him when I heard it Friday evening or Saturday when I heard it.

Q. I will ask you if when you were talking to Mr. Paschal,
398 the deputy marshal wasn't around there near to you.

A. Yes, sir; I believe he was sitting off a piece.

Q. Was there anybody else there?

A. Jim Niggerhead was there.

Q. A white man—tall man?

A. I believe there was another fellow there, if I am not mistaken.

Q. What was his name?

A. I don't remember his name.

Q. You were chained to Aleck?

A. Yes, sir.

Q. And Galcatcher was guarding you?

A. He guarded me the first night I was under arrest.

Q. He guarded you there one night?

A. Yes, sir.

Q. He is an Indian?

A. Yes, sir.

Q. You are an Indian?

A. Yes, sir.

Q. You deny having a conversation with Mr. Paschal which he testifies to, and you deny having that conversation with Galcatcher that he testifies to, and you claim that you were at Johnson's, and he has sworn that you were not there at the time he claims, and you deny that you fired your pistol off after leaving Mrs. Carey's before going to your co-d'fendant, Sam Hickory, that evening?

A. Yes, sir.

Q. You heard what Squirrel testified as to his conversation with you. Do you remember what he said—what he said you said to him—when he was on the stand?

A. I don't believe Squirrel Carey has been on the stand yet.

Q. Not Squirrel, but Joe. Which one of the Careys was it you met out in the woods on Thursday?

A. I never met anybody in the woods.

398 Q. Out near your aunt's?

A. It was Neal Nugent.

Q. Do you remember what he said that you said to him?

A. I don't remember saying anything to him.

Q. Do you remember of his testifying you had a talk with him?

A. I saw Joe Keener, and I asked him where he was going, and he said he was going after his horses, I believe.

Q. Where was you Thursday morning?

A. I went at my aunt's.

Q. It is true you met him Thursday morning?

A. I saw him.

Q. How far were you from Tahlequah on Thursday morning?

A. I was about 15 miles.

Q. How far were you from John Johnson's?

A. Three or four miles.

Q. You were not at Tahlequah at all Thursday night?

A. No, sir.

Q. Did you meet John Carey and Anderson coming out of Tahlequah on Thursday?

A. I don't remember. I said I wasn't at Tahlequah.

Q. You didn't meet them?

A. No, sir; I could not meet them if I hadn't been there.

399 ISAAC SHADE, having been recalled upon behalf of the defense, was examined by Mr. J. Warren Reed, and testified as follows, to wit:

Question. State if you interpreted for John Johnson when I interviewed him to see what his testimony would be as to where Tom Shade was.

A. Yes, sir.

Q. State whether or not in your interpretation of his testimony that he said that Tom staid at his house Tuesday night, Wednesday night, and Thursday night and Friday night of that week.

The DISTRICT ATTORNEY. I object to his question. They have sent for Johnson, a brother-in-law of the defendant Shade, and they ask him the question upon the stand if the defendant came to his house and how long he remained. He testified that the defendant Shade came to his house and brought his wife there on Tuesday evening after dark; that he left his wife at his house, and went off, and that after leaving upon Tuesday evening he didn't come back again until Friday evening after dark. He then came back, got his wife, and left. That from Tuesday evening after dark, when he brought his wife there and left her, until Friday evening, when he came back and got his wife and took her away, that he did not see him, or know where he was. That is his testimony, substantially. This witness was brought here by the defense; he was brought here at the expense of the Government, upon an application of theirs. This application
400 of theirs does not set up what they now profess that he told them. The application that they make is in these words:

"United States of America v. Tom Shade, murder. In the circuit court for the western district of Arkansas. Comes now the defendant, upon his oath——

Mr. BARNES (of counsel for defense). We didn't write the application ourselves. It certainly can not be put in evidence in that way.

The DISTRICT ATTORNEY. I am not putting it in evidence.

Mr. BARNES (of counsel for defense). Reading it to the jury has the same effect.

The DISTRICT ATTORNEY. If there is any trouble about that they can step out. In their application to your honor they state this: "In the circuit court for the western district of Arkansas. Comes now the defendant"—this is signed by Thomas Shade—"and upon his oath says he can not safely proceed to trial without the testimony of Cornelius Boudinot, Arch Downing, Becca Shade, John Rat, and John Johnson, all residing at or near Tahlequah, Indian Territory, by whom he expects to prove that he was at the town of Tahlequah on Tuesday and Wednesday, the 22nd and 23rd of September, 1891; that said testimony is true, and he is without the necessary means," etc. That is a statement of what they expected to prove by Johnson as well as by the others. They state in this application that they expect to prove by Johnson and these other wit-

nesses, not that he was at Johnson's in the evening and at Tahlequah in the morning, but that on Tuesday and Wednesday upon these two
401 different days that this defendant Shade was in Tahlequah. Now, then, they bring Johnson here, and they bring this other witness here, and they go upon the stand, and testify that he was in Tahlequah upon Tuesday; they prove this by at least five witnesses. One witness, I believe, testified that he saw him upon Wednesday in Tahlequah. It is in proof by their witnesses further, and I believe by this very witness on the stand, that he himself saw the defendant Shade in Tahlequah upon Tuesday, and he himself saw the defendant on Wednesday as he was going towards Tahlequah, coming from Johnson's. They put Johnson on the stand, their own witness, a witness they have brought here for the purpose of proving a different state of facts from what they now claim, that he told them in their office a different state of facts. When they ask him the question upon the stand as to where the defendant was upon Tuesday evening he answers in harmony with their application, because it is stated by them, and it is their th'ory that upon Tuesday evening he left and went to Johnson's. He says it is true that he did come to his house on Tuesday evening, but he left, and he never saw him any more until Friday, when he came back after supper and took his wife away. He is their witness. His testimony is not discordant with the facts that they set up that he would swear to; it is not contradictory to the fact that Shade himself has sworn that he would state. It would hardly do when a witness comes here and does not make any variance in his testimony given on the stand, and with the facts set up in their application, it would hardly do to say that they are so surprised that they can contradict their own witness. In fact, they haven't yet said they were surprised by this testimony. I supposed they would do that.

402 Mr. BARNES (of counsel for defense). When this party was first arrested this short application was drawn up by another attorney, asking for four or five witnesses, making this short statement as going to that part of the alibi to show where this man was on Tuesday and Wednesday. Now, to say that because an attorney has set up a competent fact that he could prove by all of these witnesses in this short application, the defendant could not come in with any other competent testimony from these witnesses, or any of them, that it wasn't all set out, would not do.

The COURT. What was the question you asked this witness?

Mr. BARNES (of counsel for defense). The question I asked this witness, and I do it, I think, upon good authority, if during the preparation of this case for trial he acted as interpreter for us, or for Mr. Reed, in getting a statement of the testimony of this man Johnson, who we have introduced as a witness, and if while he was so acting as interpreter on two different occasions in our office, if Johnson did not tell him that Tom Shade staid at his house on Tuesday night and Wednesday night, and Thursday night and Friday night, and if this witness did not so interpret it to Mr. Reed.

Now, then, we undertake to show by Greenleaf on Evidence, Vol. 1, sec. 444, that we are not to be sacrificed to this witness, when in the preparation of this case he has made one statement, and he comes here and swears to another upon the stand. This is the section upon which we reply. The other section preceeding it points in the same direction.

"Whether it be competent for a party to prove that a witness
403 whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand, it is urged that a party is not to be sacrificed to his own witness; that he is not represented by him, nor identified with him, and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. On the other hand, it is said that to admit such proof would enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. For it is said that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory declarations are proved by the adverse party."

We say we are surprised by this testimony, and we offer to prove by the witness now on the stand that the party, Johnson, during the preparation of this case for trial made a different statement to us than he
404 made when placed upon the stand by us. It does not stand to reason or common sense that if the witness had told us different from what we now claim he told us that we would put him on the stand and expect to prove these things by him. We now offer to prove by the man who interpreted for us just what Johnson's statements were.

The DISTRICT ATTORNEY. I will now read the next section from the authority that the gentleman has just read:

"The author seems in the preceeding section to have stated the doctrine of the right of the party to contradict his own witness who unexpectedly testifies against him, somewhat more strongly than is held by the English courts—"

Here is the distinction: John Johnson has not testified against the defendant. He simply said that at a certain time he wasn't at his house. He does not introduce any evidence upon his part tending to show where he was, or that he was at the place of the killing, or anywhere else. He simply stated that he wasn't at his house at that time.

"And the rule of the American courts is even more restricted than that of the English courts in that respect. The question is extensively discussed in the case of Melhuish v. Collier, both by counsel and by the different members of the court, and the conclusion arrived at is, that you may cross-examine your own witness, if he testify contrary to what you had a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and th's refresh the memory of the witness, and give him a full opportunity to set the matter right if he will; and at all events to set yourself right before the jury.
405 But you can not do this for the mere purpose of discrediting the witness——"

Mr. BARNES (of counsel for defense). We do not do it for that reason.

The DISTRICT ATTORNEY. "Nor can you be allowed to prove the contradictory statements of the witness upon other occasions, but must be restricted to proving the facts otherwise by other evidence."

This is from the gentleman's own authority.

"And the same rule prevails in courts of admiralty. And this seems to us to be placing the matter upon its true basis.

"When a witness has been examined in chief the other party has a right to cross-examine him," etc.

This shows that it won't do to read a part of an authority and leave the remainder unread.

Mr. BARNES (of counsel for defense). Have you not, in trials in this court, more than half a dozen times, contradicted your own witnesses in this way?

The DISTRICT ATTORNEY. No. (To the court.) I take the gentleman's own authority and read it to your honor. You may cross-examine a witness. You are allowed to go that far. If you did not put the witness on the stand, and the other party called him for cross-examination, then the rule is enlarged, and you may contradict him. If the gentleman had left Johnson off the stand, after having sworn him, I could have put him on the stand for the purpose of cross-examination, and then if he made this statement they could impeach him by contradicting testimony, but as long as they put him on the stand——

406 Mr. BARNES (of counsel for defense). We are not holding that a party on the other side that is sworn can be called for cross-examination; you have to call him as your own witness.

The DISTRICT ATTORNEY. You are wrong about that. In the last murder case tried that question came up and was decided by the court, and the court read numerous authorities upon the very question. When I had a party by the name of Big Head, or Big George, sworn, and refused to put him on the stand, the defense put him on the stand, and I brought testimony here to——

Mr. BARNES (of counsel for defense). I think the court has held if you call a party for cross-examination that does not keep the other party from cross-examining him.

The DISTRICT ATTORNEY. If you call a party for cross-examination, that gives the other party a right to cross-examine him back again, or to impeach him; but when you put a witness on the stand, if you are surprised, by the very authority you have read, by both English and American authority, you are not allowed to impeach your own witness. You may cross-examine him for the purpose of refreshing his memory, call his attention to it. That is the rule that I have read to your honor, and it seems to me that that is the rule, especially in a case where the party is not really testifying adversely, as for instance——

Mr. BARNES (of counsel for defense). That is the effect of it. Of course, when you consider it in his whole testimony it is adverse testimony.

The DISTRICT ATTORNEY. The effect of it is, it leav's you without your alibi established.

The COURT. I do not think, under the circumstances of this
407 case as it stand' that the party could contradict his own witness. He is called her', and as the law says, credit is given him by the

party calling him What is meant by calling a witness is to put him on the stand. He is called, put on the stand, and when his testimony does not turn out to suit the parties who called him they want to discredit him, not by proving that something else is true, for they can always do that, but that he made other statements at another time. I do not think that is the rule anywhere.

Mr. BARNES (of counsel for defense). He made statements that surprised us. He makes a statement on the stand different from the statement made to us in the preparation of the case for trial, and thereby surprised us.

The COURT. I think there is no ground for surprise. You can find no inference from this case that he is unfriendly to this defendant; he is his brother-in-law, and the defendant himself testified that he is friendly to him, and has always been. Johnson goes on the stand, and because he makes a statement that is not as you expected it you can not turn around and contradict him.

Mr. BARNES (of counsel for defense). I don't know how we could be taken more by surprise.

The COURT. I do not think that mere surprise gives you the right to do it. I think it gives you a right to cross-examine him, refresh his memory, bring his mind up to these things. You did not do that, as I remember your examination.

"But a party bone fide surprised at the unexpected testimony of a witness may be permitted to interrogate the witness as to previous
408 declarations alleged to have been made by the latter inconsistent with his testimony, the object being to prove the witness's recollection, and to lead him, if mistaken, to review what he has said."

The rule prevails everywhere that if a party calls a witness to a certain extent he endorses his credibility, and if his testimony turns out to be not quite as he expected it he can not turn around and destroy it. You can prove that facts are different from what he has stated.

(Defendants except.)

Defense rests.

409 The defendant also recalled ISAC SHADE, a witness for them, to contradict the testimony of John Johnson, a Cherokee Indian, another of defendant's witnesses, who had been called and examined by counsel for defendants as their witness previous to Isaac Shade being recalled. They offered to prove by Shade that he acted as interpreter for said Johnson during the preparation of the case for trial by counsel for defendants, and that during such time he, the said Johnson, made a statement of certain material facts favorable to defendant to one of their counsel, and claiming to be surprised by said Johnson's testimony offered by said Shade to prove that to Mr. Reed, of counsel, on two different occasions at the law office of Barnes & Reed, during the preparation of said case, said Johnson, through said interpreter, stated to him that Tom Shade, one of the defendants, staid at his house on Tuesday, Wednesday, Thursday, and Friday nights of the week of said killing and covering the time thereof. Whereas his, Johnson's, testimony was that said defendant, Shade, only staid at his house Tuesday night of said week. To the offering and introduction of which testimony the district attorney objected and after argument the court sustained said objection.

To which ruling of the court in refusing to allow the introduction of said testimony the defendants at the time excepted.

Defense rests.

Whereupon the Government produced and examined in rebuttal the following named witnesses, to wit:

G. W. Harlow, John Carey (recalled), Chas. Snell (recalled), James Anderson (recalled), Aleck Stop (recalled), who testified, respectively, as follows, to wit:

410 *Government's rebuttal.*

CHARLES SNELL, recalled on behalf of Government, testified as follows, to wit:

The DISTRICT ATTORNEY. Question. Please state if you were present on the edge of the prairie, on the morning after Tom Shade was arrested, I believe it was, at any rate while he was under arrest, and when Mr. Paschal came there to the camp and asked to have the shackles taken from Big Aleck.

A. Yes, sir; I was there.

Q. Did you hear a statement made by Shade to Mr. Paschal relating to Big Aleck?

A. Yes, sir.

Q. What did Shade say to Mr. Paschal about that, as near as you can remember it?

A. He said that Sam Hickory sent Big Aleck after him to come over there; that he had shot a marshal, and he said that he went over there by the schoolhouse somewhere, or, anyway, that he had met Sam Hickory and a white man, going towards town.

Q. Where did he say that he met Hickory and the white man?

A. Somewhere over there, I believe on Spring Creek, or Spring Creek schoolhouse; anyway in that direction. I could not testify just where now; I did know at the time.

The COURT. Blue Springs schoolhouse.

The WITNESS. Yes, sir; I believe somewhere over that way.

The DISTRICT ATTORNEY. You don't remember the name of the schoolhouse, but it was over there somewheres?

A. Yes, sir.

Q. Shade said that Hickory had sent Big Aleck after him, and
411 that he had gone there and met Hickory and a white man on the road somewhere over there, near the schoolhouse; you don't remember the name of it?

A. Yes, sir.

(Cross-examination waived.)

412 G. W. HARLOW, being called and sworn, and examined on behalf of the Government, testified as follows, to wit:

The DISTRICT ATTORNEY. Your name is G. W. Harlow, is it?

A. Yes, sir.

Q. Please state if you were there at Big Aleck's shortly after Wilson, the marshal, was killed over there?

A. Yes, sir.

Q. On what day?
A. I was there on Thursday the first time.
Q. Please state if you went there the next day.
A. Yes, sir.
Q. When you went there the second time on Friday you went with Mr. Paschal and the crowd that went that day?
A. Yes, sir.
Q. Did you see Tom Squirrel that day, this long-haired Indian?
A. Yes, sir.
Q. Please state if you at any time saw him go around the house and throw a rock.
A. Yes, sir; when me and Judge Paschal rode up there, he did.
Q. What did he do?
A. He stepped off the gallery and went around and throwed into the thicket.
Q. What did he throw?
A. It looked like a rock.
Q. Please state if you found horse tracks or where a horse had been hitched at any time there?
A. Yes, sir; I saw where a horse had been hitched.
Q. In what direction was it relative to the place towards which he had thrown the stone?
A. It was where I saw the horse had been hitched; was a little northwest of the house.
Q. In what way had he thrown the stone?
A. He throwed in in that way.
Q. In what direction?
A. Northwest is what I would call it.
Q. Over towards where you found the horse had been hitched?
413 A. Yes, sir.
Q. How far from the house did you find the horse had been hitched?
A. I will say 40 or 50 yards from the house.
Q. How long after you saw him throw the stone over in that direction was it that you discovered that the horse had been hitched there?
A. We discovered it the day before. We had looked around there on Thursday and then we noticed it again on that day.
Q. Did you find any other place in there where a horse had been hitched?
A. We found some place about half a mile from there, I reckon, looked like where it had been tied.

Cross-examination by Mr. BARNES:

What is your name?
A. Harlow.
Q. What is your first name?
A. George.
Q. How often have you been down here in prison?
A. This is the first time I was ever in this place.
Q. I see George Harlow's name here on this register. If there has been a George Harlow here, you were not the man?
A. No, sir.
Q. Which direction did you say that was?

A. Northwest.
Q. Isn't there a field in that direction?
A. The field is right down north of that.
Q. Isn't there a field northwest of the house?
A. It is a little northwest; it is more north than it is west.
Q. What is the size of it?
A. It is a small field, an acre or more; just a small field.
Q. Don't you know there is a field as close as fifty yards from the house?
A. I know there is a thicket in ten steps of it on that side.
414 Q. You just saw this man step out and throw a rock?
A. Yes, sir.
Q. Did you see the rock?
A. It looked like a rock. I didn't get the rock.
Q. What is the reason you didn't?
A. Because I didn't.
Q. If it is a thing that attracted your attention one way or the other, it looks like you would.
A. I didn't think about going to look for the rock.
Q. You didn't think of the circumstance at the time?
A. No, sir.
Q. Did you say that the man looked mad when he threw it?
A. No, sir.
Q. It didn't produce any impression on you at the time he was throwing?
A. No, sir.
A. It might have been a tin cup, or something that way?
A. No, sir; I could tell it was a rock.
Q. How close was you to him?
A. I was about four or five or six steps of him.
Q. Did the old man seem to throw it a good ways, or just a little distance?
A. He didn't seem to throw it a good ways; about ten steps, maybe more, and maybe not so much.

415 JAMES ANDERSON, recalled on behalf of the Government, testifies as follows, to wit:

The DISTRICT ATTORNEY. Do you know Thomas Shade, the defendant?
A. Yes, sir.
Q. Please state if you were at Tahlequah on Thursday.
A. Yes, sir; I was there on Thursday.
Q. Was there anybody with you?
A. John Carey and I went out there.
Q. Please state if you saw the defendant Shade upon that day; and if so, where.
A. Yes, sir; I saw him that evening.
Q. Where?
A. I met him; it was about a mile, I reckon, from town, maybe not so far, going in the direction towards Fourteen Mile Creek.
Q. Going in an opposite direction from town?

A. Yes, sir.
Q. You say John Carey was with you?
A. Yes, sir.
Q. That was Thursday evening; about what time?
A. It was about an hour or an hour and a half by sun.

Cross-exmination:

Mr. BARNES. Who else was along besides Carey?
A. No one but him and I.
Q. Were you and him together all day that day?
A. Yes sir; Hog Shooter and some others.
Q. That is the only time you saw this man that day?
A. Yes, sir; that evening is the only time I saw him.

416 Q. I will ask you if the place you saw him on that evening, if you saw him at all when you were in company with John Carey, wasn't on Fourteen Mile Creek, from four to six miles from Big Aleck's?
A. I seen him about a mile or a mile and a half from Tahlequah.
Q. Was Squirrel Carey along?
A. No, sir.

417 JOHN CAREY, being recalled on behalf of the Government, testified as follows, to wit:

The DISTRICT ATTORNEY. I will ask you if you were in Tahlequah on Thursday, the week of this killing, in company with Anderson.
A. Yes, sir.
Q. Please state if you saw the defendant, Shade, that day.
A. Thursday evening he was going on towards Tahlequah, and we saw him.
Q. How far from Tahlequah?
A. I guess it was three-quarters of a mile, something near, right at a fellow named Jeff Parks, I think his name is.
Q. You met him?
A. Yes, sir.
Q. You were going along, and he was going in an opposite direction.
A. He was going towards Tahlequah, and we were going from Tahlequah.
Q. What time in the evening was it?
A. It was tolerable late; I can't tell right what time it was.
Q. Was it late in the evening?
A. No, sir; the sun was along about there [indicating about five o'clock].
Q. Did you say anything to him?
A. Yes, sir; asked him for a chew of tobacco.
Q. Did you get it?
A. Yes, sir, he gave me a chew of tobacco.

Cross-examination. Mr. BARNES:

Did you say anything about seeing him on Thursday evening when you were on the stand before?
A. No, sir.
Q. Were you not asked how often you had seen him that week.

418 A. I might have been, and not said it.

Q. You undertook to tell where you had seen him that week, didn't you? You were asked to tell everything you knew of the occurrences on these days, and you were asked where you saw Tom Shade, wasn't you?

A. I was asked that, I think.

Q. Why didn't you tell you saw him on Thursday evening? Have you told anybody until right now that you saw him on Thursday?

A. Yes, sir.

Q. Didn't you claim it was Friday night that you saw him?

A. I saw him Friday and Thursday.

Q. Isn't Friday the only time you claim to have seen him?

A. No, sir; I never said it was the only time; I said I saw him on Friday morning close to Harlow's.

Q. On 14-mile Creek?

A. Yes, sir.

Q. That is all the time you told about seeing him?

A. Yes, sir; that is all I said here.

Q. You remember you were asked all about it, all the places you had seen him at different times. Didn't you state that had been the only time you had seen him, and then you didn't speak to him?

A. I didn't speak to him Friday, but I did speak to him Thursday.

Q. You spoke to him then and asked him for a chew of tobacco?

A. Yes, sir.

Q. Was you at Big Aleck's on Thursday?

A. Yes, sir.

Q. At what time?

A. About eight or nine o'clock, somewhere along there; maybe ten.

Q. In the morning?

A. Yes, sir.

419 Q. Was you there any more that day?

A. Yes, sir.

Q. How far did you live from Tahlequah?

A. We call it 15; some calls it 13. I would say it was about 15 miles; full-blood Indians would call it closer. We will call a mile longer than a white man will.

Q. One of your Indian miles—a coon-skin mile, with the tail throwed in?

A. No, sir; it is an Indian mile.

Q. That is an Indian mile, is it?

A. Yes, sir.

Q. 15 Indian miles from your house to Tahlequah?

A. No, sir; 15 of the other kind is what I call it.

Q. How far would it be in Indian miles?

A. About 12, I reckon; that is what they call it.

Q. Indian miles are the longest?

A. Yes, sir.

Q. How long did you stay over there Thursday at Big Aleck's?

A. Not very long.

Q. How long?

A. There was eight or ten of us went over that day.

Q. How long were you around there?
A. I could not say; we wasn't there long.
Q. An hour or two?
A. It could not have been that long, I don't think.
Q. About how long; what time did you leave there?
A. I could not tell what time we left there; maybe 12.
Q. Then you went up to the mill, did you; come from the mill to Big Aleck's?
A. Yes, sir.
Q. How long did you stay at the mill?
420 A. No longer than we could get dinner.
Q. Where did you get your dinners?
A. We got it there.
Q. How long did it take you?
A. I don't know; I could not tell you.
Q. You staid there an hour or such a matter, and got your dinner, didn't you; how long did you stay there?
A. No longer than we could eat dinner and our horses got done eating, and we went on to Tahlequah then.
Q. You rode 15 miles?
A. It was 12 miles from there.
Q. 15 miles from Aleck's. You left Aleck's, it might have been noon?
A. Yes, sir.
Q. How far is it from Aleck's to the mill?
A. I could not say.
Q. How many miles, about?
A. As near as I could get it it might be about three miles; maybe not quite three.
Q. Then it is about 12 miles from the mill to Tahlequah?
A. Yes, sir.
Q. What kind of miles, Indian miles or the other kind?
A. The other kind; white man miles.
Q. Then it is as far from Aleck's to Tahlequah as it is from your house?
A. Yes, sir.
Q. You got your dinner there and went to Tahlequah?
A. Yes, sir.
Q. How long did you stay in Tahlequah?
A. Staid there until about sundown.

421 ALECK STOCK, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. This is Aleck Stock, is it?
Answer. Yes, sir; this is him.
Q. They call him Big Aleck up there?
A. Yes, sir.
Q. Ask him if, after he came home and found his house shut up there on Wednesday, if he had a talk with Hickory, the defendant, about how hat shooting was done?
A. Yes, sir; we had a talk.

Q. Where was it that they had the talk?

A. He was setting on the porch at my house.

Q. Did Hickory tell him how this thing was done?

A. Yes, sir.

Q. When he was on the stand before he said that Squirrel told him that Sam was down at the house on Wednesday morning, or Wednesday sometime, and that he went over and found him at his house. I want you to call his attention to that.

A. He says he said this: That he was in your room; that is what Jim told him.

Q. And then he went over and saw him; was it after Jim told him he was in his room that he had this talk with him?

A. He says that Jim told him that he was out on the porch in your house when he went out there.

Q. I am not asking him what Jim told him, now; I am asking him if, after Jim told him that, that he had the talk with Sam?

A. He says "No."

Q. It wasn't after that; then it must have been before. Does he understand you?

A. I don't know.

Q. Do you understand me?

A. Yes, sir.

422 Q. It seems to me it ought to be quite easy to get it from him. What I want to know is, when Jim Squirrel told him that, did he go down and see Hickory and have this talk with him?

A. He says that is when they had the talk; when Jim told him; yes, sir.

Q. He went down to see him and had a talk with him?

A. Yes, sir.

Q. What did Hickory tell him about this shooting?

A. He says that Hickory said that the marshal told him that he had come after him, and that now he must go, and then Sam told the marshal that he was afoot and it would be very difficult for him to go, and then the marshal told him that there was a horse, for him to ride one of them.

Q. I want him to commence at the beginning; when the marshal first came up there. What did the marshal say when he first came up there?

A. He says that Sam told him that there was a marshal came up here yesterday just a little while after you left, and asked me which road lead to Louis Hawkins's, and then he asked me if that was Sam, and Sam told him yes, and then the marshal told him that he had come to put him under ar'est, and Sam said all right; and then he says that Sam said they went back to the house then, unhitched the team——

Q. Did he say anything about getting a drink of water?

A. I am not to that yet. After he got to the house he went in the house, and went in and got a drink of water.

Q. Both of them?

A. Yes, sir; and then they went out again, went out a little distance from the house, and set down on a pole or something.

423 Q. Find out what it was that they set down on?

A. It was a peice of a house log.

Q. What occur'ed after they went out and set down?

A. While they were setting there he says that he told him that the marshal read the writ to him, and then he says he told Sam why was all this, the way the house was shot——

Q. Hold on. The marshal read the writ to him. Ask him if he told him what the writ was for?

A. Yes, sir; he said he told him it was for whiskey. For introducing four gallons of whiskey last May; and he says they didn't have him charged with selling at all.

Q. It was for introducing four gallons of whiskey?

A. Yes, sir.

Q. Tel' him to go ahead?

A. And then he says Sam told him that the marshal told him that they must go now, and that he had come after him, and he says that Sam; said he told the marshal all right, that he would go along, and then he told the marshal that he was a foot though, but he would go, it would be rather hard on him; and then he says the marshal told him to ride one of these horses there, and Sam replied that the horse didn't belong to him, the horses were not his; and then the marshal told him to ride one of them as far as where the owner was, and if he didn't like it he could bring it back, if he didn't lend it to him to ride on he could bring it back; and then he says when he told the marshal all right he started into the house to get a saddle.

Q. That is, Hickory, the defendant, did?

A. Yes, sir; after he had gone a little distance the marshal shot at him, and the smoke surrounded him all around, and he kept going, and the second shot that was fired when he got near the door——

Q. When Hickory had gotten near the door?

A. Yes, sir.

424 Q. Tel' him, now he has told about the second shot that the marshal fired, to go on from there?

A. And he says that he fired the third shot——

Q. Where does he say that Hickory said he was when the marshal fired the third shot, and where was the marshal?

A. He was inside of the house; Sam Hickory was.

Q. Where was the marshal?

A. Outside.

Q. Outside at the same place where he fired the other two?

A. No, sir; he said the marshal had gone around to the side room.

Q. Had he shot the three shots from the outside?

A. Yes, sir.

Q. The three shots were fired from the outside; then what?

A. He says during the fighting in the house——

Q. He has not told about them getting in the house yet; three shots fired outside; what did the marshal do after he fired the third shot upon the outside?

A. He says after that the door was shut on him, and he went around the other way, went around——

Q. The marshal did?

A. Yes, sir.

Q. After firing the three shots he went around where, to what door?

A. He says he went around to the front side room door and came in.

Q. Go ahead?

A. And he says that they each fired two shots there.

Q. On the inside?

A. Yes, sir; and he says the second shot he shot at the marshal he done his hand this way [indicating by placing hand on front part of person] and turned around.

Q. Each fired two shots in the house, he and the marshal?

A. Yes, sir.

Q. And that at the second shot that Hickory fired the marshal threw his hand up?

A. Yes, sir.

425 Q. Tell him to go ahead.

A. And then he says that he asked Sam if he went out——

Q. Which way did the marshal go? Did he say that Sam told him that the marshal went out?

A. Yes, sir; he says that Sam told him that after he done his hand this way he went out the way that he came in.

Q. Then he asked him which way the marshal went; what did he say?

A. And he says he asked Sam then if he went out to see anything about the marshal, whether he had hurt him very bad or not, and he says Sam told him that he did not.

Q. Sam told him that he did not go out to see the marshal?

A. Yes, sir.

Q. But he has got a little ahead there; he asked him which way the marshal went. What did Sam tell him when he asked him which way he went when he went out of the house?

A. He says that he told him when he went out he went to the other house——

Q. He is not answering that question. Get an answer to the question I asked, "When he asked Sam which way the marshal went, what did Sam tell him?" If he undertakes to say anything else, stop him and make him answer the question.

A. He says when he went out he went back the way he came.

Q. Did he say how far he went; whether he went to the brush or not?

A. No, sir; he didn't say anything about that.

Q. Tell him to go on then. Ask him to state what Sam did when the marshal went out.

A. He says there is not anyone knows that he did do.

Q. What did he tell him that he did?

426 A. He says he asked him then what did he do that night——

Q. No, no. He certainly started to tell you something awhile ago about the defendant saying that after this man went out that he, the defendant, went back to the other house; he certainly told you something of that kind.

Mr. BARNES (of counsel for defense). I think the old man meant that he himself went to the other house.

The DISTRICT ATTORNEY. No; he didn't. I have talked to him too often to know he didn't say that.

The INTERPRETER. He says when he went out he went out to this other house and set around there *there* and staid there until sundown.

Q. The defendant told him that, he did?

A. Yes, sir.

Q. Did he say that he went out as soon as the marshal went out? He has told me that he didn't go out to see the marshal, to see whether he was wounded or not, or hurt or not—that is, what Sam told him—but he went out himself; went to the other house himself. Is that right?

A. Yes, sir.

Q. Then what after that?

A. Then he says he told him that very late that night, in the direction where the marshal came, he heard horses's feet coming down the road, and he told him that they first went to his house and to Aleck's house.

Q. That he heard horses' feet come there, and they first went to Aleck's house, and then where?

A. He says he told him that they stood around there for some time, and then after awhile they went down the hill to Jim's house.

Q. Did he say who they were?

A. And he says he asked him then if he knew who they were, and he told him they were Cherokees.

427 Q. Did he tell him they were John Carey and Squirrel?

A. He asked him then if he knew any of them, and Sam told him yes, that he knew Hogshooter and Steve.

Q. Steve what?

A. Hogshooter's brother, but he didn't know the other one.

Q That was at night?

A. Yes, sir.

Q. He has said that the defendant Hickory told him that he didn't go out to see the man at all, to see if he was wounded or hurt; ask him if he told anything about moving the body away from there?

A. No, sir.

Q. But told him that he didn't go out to where the man was at all to see him?

A. Yes, sir.

Q. Ask him if he asked Hickory if he knew whether the man was wounded or dead?

A. He says that he didn't tell him that he had seen him.

Q. Told him that he didn't go out to see him, did he not?

A. He says that he told him that he hadn't been out there to see him; didn't go out to see him.

Q. What I want to know is if he made any inquiries; if he asked whether the man was dead or wounded?

A. No, sir.

Q. What is the reason he didn't; didn't he want to know whether the man was dead or not, or whether there was a wounded man laying around his house or not?

A. He says he wasn't stout enough.

Q. He was not stout enough to find out whether there was a dead man laying around there or not.

Mr BARNES (of counsel for defense). It seems to me like this is

428 just going back over the case outside of the man's statement. You asked Hickory about a certain conversation. You have been over that.

The DISTRICT ATTORNEY. He said that Hickory told him that he didn't go out to see that body, and now I am asking him if he asked him or learned from him whether the man was wounded or not.

Mr. BARNES (of counsel for defense). You went all over that yesterday in your examination in chief.

The DISTRICT ATTORNEY. No; I never asked him a word as to what Hickory said to him, because I studiously avoided it, for the reason I knew if I did you would ask him for the whole thing at a time when the defendant could set here and hear every word of it. (To the interpreter.) Tell him to go on. Ask him whether he asked Hickory anything about whether he was was wounded or dead, whether he made any inquiries of him.

A. He says he asked him and he says he told him that he didn't go out to see.

Q. He says that he asked Hickory if the man was dead or wounded or dead and he said he didn't go out to see?

A. Yes, sir.

End of the testimony.

429 This was all the testimony offered upon either side in this case.

Whereupon, after argument by the counsel to the jury, the court charged the jury orally as to the law of the case which charge was taken at the time by the court stenographer, as follows, to wit:

430 UNITED STATES
vs.
THOMAS SHADE AND SAM DOWNING. } Murder.

CHARGE OF THE COURT.

Delivered August 25th, 1892, 9:00 o'clock a. m.

PARKER, *J.:*

GENTLEMEN: The defendants in this case, Sam Downing, or, as he is sometimes called, Sam Hickory, and Thomas Shade, are charged with the murder of Joseph Wilson. The charge as laid in the first count of the indictment is that on the 22nd day of September, 1891, in the Cherokee Nation, they took the life of Joseph Wilson by willfully and with malice aforethought shooting him to death with a gun. The second count of the indictment charges an offense of the same character—that is, the killing of the same man, Joseph Wilson—but charges that the means used were different from those set out in the first count, inasmuch as the second count charges that the killing was done with an axe, and that the axe was used in the way that a blunt instrument would be used—that is, that they did beat, bruise, and wound Joseph Wilson, from which wounds he
431 died. That implies that the axe was used not with the cutting part of it, but with the blunt part of it, either the side of the axe or the pole of it, or with some other blunt weapon. Now, in regard to the means set out in the first count of the indictment, it is charged that he was shot with a gun. If the proof shows the use of a weapon of a kindred nature,

such as a pistol, that is sufficient; and the same with reference to the weapon alleged in the second count of the indictment with reference to the axe.

In this case, as in all others that come before you, the great primary question to determine is whether or not these parties or either one of them are guilty of the crime as charged, or are guilty of a crime. The second proposition to be solved by you is as to what that crime is. If, under the law, it is properly characterized and only can be characterized as murder, you make a great blunder if you designate it as anything else; and if it is not murder, but some other offense, you would make a blunder of like character if you designated it as murder. So you see the duty of designating, or characterising, or, as we would say famil'arily, naming it is a great one. It is a duty equally as imperative, equally as responsible, and equally as important as the duty of find' out whether crime exists or not. You can only discharge this duty, of course, by proper attention to the facts in the case.

There is nobody present at this trial, except one or both of the defendants, who can be regarded as positive eye-witnesses to that occurrence. If other persons saw it they are not willing to tell it. If these two old men witnessed it they kept it very secret, that part of it; they keep it
432 concealed. So this proposition must be solved, as all these propositions are largely to be solved, by what we call circumstantial evidence; by evidence in the shape of the characteristics that surround the transaction. A man can not do any act in this life which, if it is properly viewed, if the things that surround it, and the facts that go to show how it was done are properly looked at, but that intelligent minds can correctly characterise the nature of the act, and they can name it as an innocent or a guilty act from these circumstances. And especially is that the case when the circumstances are concurred in by all parties affected by a proposition; when the facts which surround the transaction are conceded, or testified to by one of the parties charged, you have a set of circumstances that are concurred in, that are agreed to, and it is your duty to take these circumstances to enable you first to find out if a crime exists, and secondly to enable you to say what the character of that crime is.

There are certain elements that enter into this charge, and these elements must be found to exist. In the first place it must be ascertained by you that the man who is alleged to have been killed is dead. That is the very first thing to look at, because if you enter into a case of this kind, and it turns out at the threshold of it that the man charged to have been killed is not dead, as a matter of course that is an end of the investigation. There can be no controversy about that question in this case; that fact is conceded. It is recognized as a fact, and it is testified to by the defendant Downing himself that he hauled him off laying lengthways upon the coupling pole of a wagon, and took him down to the place where he was found, and you may put that proposition aside as one that is estab-
433 lished. The second proposition is, that Joseph Wilson died by violence either of the kind named in the first or second count of the indictment; that the violence alleged to have been used to produce his death was either the violence set out in the first count or that named in the second count. In order to ascertain that, you take the condition of the man as best you can ascertain it, the character of the wounds that

were inflicted upon him, what his condition was afterwards, and from these you have a right to draw a conclusion, you have a right to find the the existence of a conclusion from the facts established, and that is called a presumption. You have a right to arrive at the same conclusion that a sensible man would arrive at from these circumstances going to show what the character of his wound was, what the nature of the violence exercised against him was, and from that you find as to whether or not the violence used in either one of these counts produced that result. The third proposition to be found by you is: Was this violence inflicted willfully and with malice aforethought. That is a proposition that is necessary to be found. Of course, before you can find whether it was inflicted in that way you must know what these expressions mean in the law, because it is by the law you are to solve this case as it is illuminated by the facts—in other words, you are to try it according to the terms of your oath, by the law and the evidence, and that alone. You can not try it by the law until you know what the law is. If the word "willful," for example, had the ordinary meaning of the word, and nothing else, and the phrase "malice aforethought" meant what is ordinarily meant when the word malice is used, I could simply give you the words and let you find whether
434 or not a case exists to which these words could or would apply, but they have a meaning beyond that, a meaning that the law attaches to them, and you must therefore have that meaning. I can not any better give it to you, as I have remarked often in these cases, than by reading it to you as it was given in another case tried here which has been typewritten, the definitions in that case of the expression being the same as in this, and because it can be done easier and quicker I prefer to read from the charge in the case of the United States *v.* Alexander Lewis.

"The word 'willful' as used in connection with the charge of murder, such as that which is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done."

Now, right in that connection I remind you before going any further, it becomes very easy to find whether an act was intentionally done which produced death if the weapon used was of a deadly character, especially if it was a gun or pistol, or an axe, or any weapon with which life could be easily and readily destroyed, because you consider, first, that the weapon is an inanimate thing, it has no volition, it has no power to act unless it is acted upon—the axe can not handle itself and beat the man's head to pieces, nor can a gun present itself and pull its own trigger and discharge its contents into the vitals of the man killed. Some agency must be behind these weapons, some power that has a capacity to form a conclusion that is sought to be executed must be behind it; there must be an intelligent will-power that is applied to these mere automatons, so that they can become deadly and that they can execute a deadly purpose. So when you find that weapons of that kind have been used, and a deadly result produced, you must conclude, unless there is some fact offered under
435 the head of that classification of occur'ences called "accidents," from the act alone, and the result produced by the weapon, that the act was willfully done, and that the result was willfully produced. The nature of the condition of these weapons and their character is a fact of

common knowledge, and when the proof shows to you that weapons of that character were used, you bring to bear your common knowledge to enable you to conclude that this proposition as to the character of this weapon that I have asserted is true. If we can get all this it becomes an easy matter to find whether the death was a willful death or not, if a gun is used, or any other weapon with which life can be easily and readily taken.

"Now, there is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside the definition of the word 'accident' is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which from its nature and the way it is executed as a natural and probable and reasonable result death may ensue from the execution of the unlawful or criminal act."

I now define to you the word accident that you may the better see what is meant by intent, by contrasting it with that condition that goes under the classification of an accident. When you have a proposition that is directly the converse of another, if you can understand that proposition correctly you can easier arrive at an understanding of what the converse of it is, because that which is directly opposite is more easily understood by first understanding the proposition that may be the converse of the second one.

"That which is an accident in the law is something which occurs
436 after the exercise of the care that the law requires to be exercised to prevent its occurrence. When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally, or reasonably, or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional. For example, if a man presents a gun at another, and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a willful act upon his part. And when that state of facts exist, the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can be found only by inference."

You see a man present a gun at another and fire it at him, and the man falls, and you have no data from which to conclude that the man intended to kill the other except his acts, for you have not heard him say anything about it; no threats have been made to do violence; you have no sign of his mental condition except that which is shadowed forth by his actions at

the time. Now, by the rule of common observation, what conclusion would you come to 'hen you would see an occurrence of that kind? If the occurrence is reproduced before you by the light of the testimony, you are to see it by the light of that evidence as though you beheld it with your own eyes, and if that condition is of the character that would produce a certain conclusion in your minds if you had seen it, is is your duty to come to a like conclusion when a similar set of facts are reproduced before you. By the rules of common observation what conclusion would you come to as to what the purpose of the party was who fired the gun? You would conclude that he intended to kill him; you
437 would not hesitate a moment to come to a conclusion of that kind. You would do it because he used that deadly weapon in that way, because he fired the gun at the person within shooting distance of him, and because of the very result that was produced, the law holding him to have intended that which is the ordinary result, naturally and reasonable, of his conduct. That is a result that may naturally and reasonable follow the firing of a gun within shooting distance of another and death ensues. In such a case the law says that he who fires it intended to produce that death, and intentional means willful.

"If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed it. Now, intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents a gun or a pistol at another, and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural or probable or reasonable.

"So, in a case of that kind, when you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him and fired it at him, whether that was a willful act, and when you find that (as I have told you) from the character of the weapon used and the manner of its use, because the weapon can not use itself, it can not present itself, it can not pull its own trigger, it can not of its own accord, of *of* its own will-power, because it has none, send the deadly missile in the body of the man who is killed. There is an intelligent will-power that does all that. I say, when you find a gun or a pistol has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the conclusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result. A word in this connection as to how you may find how the act was willfully done:

"The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane

man, who is a voluntary agent, acting upon motive, must be pre-
438 sumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life, or to do him some great bodily harm, is a necessary conclusion from the act.

"You take the act done. Now, your common observation teaches you that a gun or pistol fired at another within shooting distance of him will put his life in danger; it may probably destroy it."

Therefore you have a right to take the act done in that way, to infer from that act as done, if death ensues, that the party intended that act, and you find that the act was done willfully, and you can arrive at no other conclusion as to the fact that the act was willfully done if you find that the man willfully drew and presented and fired a gun within shooting distance of the other, or if you find that the man used any other deadly weapon, in a violent way so that it would jeopardise or endanger life, such as an axe or anything of that kind. That is why I told you awhile ago that when you understood exactly what the law means—and it is my effort to make it as plain as possible, to take up more time than courts usually do in charging juries that I may give them to understand the better what the law of the case is, and I find that it is a rare occurrence because of that, as I conceive (although I admit my inability to present the law as perfectly as it ought to be), in this court that the jury ever disagree upon the law. If there is any disagreement at all it is upon their failure, gen-
erally, to recollect the facts aright, or to draw the same conclusions
439 from the facts. It seems to me that that is the highest duty of the court to give the jury all the intelligent aid that it can give them, to express in different forms, in different ways, these propositions that enter into every verdict. I have undertaken to do that in defining this word willful, and I tell you that when you have a state of case of that kind that as sensible men you can arrive at but one conclusion, and that is that the death was a willful death if produced by these means that I have named. That is what is meant by this first expression that enter into the charge of murder. That is how you may find it. As I tell juries so often, when it comes to finding mental condition, when it comes to finds ing the condition of the mind to which you can not apply anything positive, not one of the five senses can we use in obtaining that knowledge—we have our sight given to us that we may see, and observe facts and become intelligent as to occurrences in that way; we have our hearing given to us for the same purpose; we have our touch, planted in the nerves, that go to the extreme ends of our fingers, given to us for the purpose of imparting knowledge to us; we have the sense of smell given to us for the same purpose, and likewise the sense of taste. Now, none of these great agencies that men possess to give them knowledge to operate so as to

aid them as a guide through life can be applied in a positive way to the mental condition; that is, you can not look upon the operations of that mind. It is not like one of these giant engines that pass here every day, where we can look at its wheels, and see its motion, and see the seat of the very motive power that moves it. We can see the application of an intelligent agency in the shape of the engineer, which puts it in motion.
440 We can not do that with the mind, yet the law commands us to find the mental condition. Then tell me how we are to find it? Some say we can not do it by circumstantial evidence, because it i' cruel and criminal, they say, to convict a man upon circumstantial evidence. That is a declaration of either fools or knaves, sympathetic criminals or men who haven't ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship. When you consider that these two mental conditions, the fact that the act was done willfully, and done with malice aforethought, can never in any case be found in any other way than by circumstantial evidence, you can see the potency in every case of that class of testimony. Circumstantial evidence means simply that you take one fact that has been seen, that is produced before you by evidence, and from that fact you reason to a conclusion. In this case, when talking about these two mental conditions, the things to be found are, first, that the man wills to do what was done, and that he willed it in such a way as that it was done with malice aforethought. Now, I told you that it was your duty in this case, as in all others, to characterize every act that you find to be a crime; that is, to name it correctly. You can only name it by knowing the existence of these ingredients that enter into it, 'nd you can only know them as they are given to you by the little things that stand around the occurrence, shadowing forth the condition of the mind that produced that occurrence, and these are circumstances that are resorted to in every case, in every criminal trial, or every civil
441 suit, where intent enters into the case as an element in it. You can find it in no other way. As a matter of fact, the great conclusions of life upon which you act and in which you believe, which control your destiny, which fixes your code of morals, and which governs you in life, and fixes your faith in eternity, are conclusions that you find only upon circumstantial evidence. You can find them in no other way. You see it is little understood, the proving power of this kind of evidence, its power and the frequency with which it is used in coming to reasonable conclusions by sensible men. I will read to you a little, after while, upon the importance of this kind of testimony in cases of this kind.

We now come to the distinguishing trait of murder, which is the characteristic of it, called malice aforethought. The fact that a killing is done willfully does not necessarily make it murder. It might be done in self-defence, and be done willfully; it is always done willfully when it is done in self-defence. I see a man who is confronting me with a deadly weapon; there is no escape from that danger, except by taking his life or losing mine. That is the only exit from it. The law says in such a case I have a right, and it is my duty to comprehend the situation, and that means I may exert will power, and when I have comprehended it, to act upon it, even to the extent of destroying human life. The law gives me that power, and I act willfully in a case of that kind when I kill him in such a way. And the law taking into consideration my unfortunate con-

dition, and the circumstances which exist, either at the time of the killing, or as shadowed forth by my conduct afterwards, and where it is not a case that can be characterized by peculiar wickedness, atrocity, or devil-
442 ishness, of the act, or of the things done afterwards, showing br'tuality, showing total disregard for all the tender considerations in the shape of mercy and charity that enter into the mind of a good man, void of all these wicked attributes, the law may look at my act in a merciful view, may commiserate it, call it not murder, but manslaughter, yet the act done by me is willfully done. But when we come to that high crime, when we come to that wicked crime, when we come to that great crime whish saps the very foundation of society, and is the great destructive agency that walks abroad, and shakes its bloody locks in the very face of those who administer justice in this day and at this time for some reason or another, when we come to that crime, we find that it has a characteristic, it has a distinguishing trait, a thing that marks it out in all its blackness and hideousness and wickedness, and terrible cruelty, and this trait it is designated as the phrase "malice aforethought." Whenever we find an act possessing that attribute, as we may see it by the light of the circumstances at the time of the killing, or in the shape of the conduct of the party or parties doing the killing after the killing is done, with reference to their treatment of the dead, and the disposition of the remains, and their conduct generally pertaining to that; I say wherever we see the existence of this peculiar attribute, this particular characteristic, we can name it by no other name than that of murder, because that is the distinguishing trait of that crime, that is the trait of all others that makes it murder. It is highly important that we should pause here long
443 enough to correctly and fully understand the meaning of this expression, because if crime exists in this case, I repeat again, if you fail to characterize it correctly, you make a mistake; you make a mistake that is of the most serious character, and that you may name it correctly, that you may give it the proper name, you must understand fully and completely the exact meaning of this phrase which makes up murder. Now, what is it? It is defined in a number of ways by the law, and when I am giving you these definitions, when I am giving you all these propositions, I am simply repeating the law. It is not original with me. I have no right to make a single proposition of the law. I would be criminal if I did so. It is not my province to make the law, but as a court to declare it to you. And when I state it in different forms, when I detain you sufficiently long for that purpose, I do it that the twelve different minds may all, if possible, exactly comprehend what it is meant by it. We have different ways of arriving at the same conclusion. We have different ways of expressing our ideas. And when a proposition is expressed in one form, it may reach the mind of one man, or two men, or half a dozen men, and the other six, equally intelligent, may not comprehend it, when stated in that way, but when stated in another form, they may be able to fully grasp it, and take it fully into consideration. Therefore, I think it is better to state these propositions in all these different forms, adhering all the time to what is meant by this expression, malice aforethought. Now, all men know the meaning of the word malice. You understand its
444 common meaning. Every man comprehends it. If the ordinary meaning was the meaning that the law attaches to the phrase, I

could simply tell you that if you found this killing was done with malice, you would find that the p'rty was guilty of murder. But it means more than that. It comprehends more than that. I will tell you by a simple illustration how you would arrive at a conclusion that it does comprehend more than ordinary malice: A is an entire stranger to B; he lives in California; B lives in Maine. They never saw each other before; they never knew each other. They accidentally meet upon the streets of Fort Smith. A, without a word or an act provocative in its character, shoots B down. There could not be any malice, in the ordinary acceptation of the term, between them, because that means a condition of peculiar spite, particular animosity, a desire to satisfy a grudge, or to avenge a real or imaginary wrong. That is malice in the or'inary acceptation of the term. That could not be the case. The conditions were such that there was not anything out of which it could grow; they did not know each other, and the causes that produced this act apparently, and which is an inflamed condition of the mind upon the part of one man against another, did not exist in that case, and could not exist; but would you, without going to the law, without pausing to note what the definition of murder or malice or malice aforethought was, for a moment hesitate to designate that act as an act of murder, as a crime of that character? You would do it instinctively. Now, why would you do so? You would comprehend
445 without waiting for any definition from any court that the word malice aforethought was broader and deeper in its meaning than the ordinary meaning of the word malice; that it means not only a case where the killing is done because of spite or animosity, or a desire to satisfy a grudge, but it means a case done without any provocation, and without any just cause or excuse in the law. That is what it means. As you know, in the case I have cited there was no self-defence, nothing to mitigate that crime, nothing done by B in that case to inflame the mind of A by an overt act of violence; so that A acted, not from a premeditated design, but upon a sudden impulse that sprung into existence then and there, that was created by the wrongful act of B. It comprehends both these conditions, as you will learn when I read to you the definition of the word. Malice aforethought, like willfully, is something that originates in the mind of the party doing the act.

"Because malice aforethought is something that originates from the mind of the party doing the act, you must find some way or another of getting at the condition of the mind that is doing that act. If we can not fathom it, if we can not penetrate its inmost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational to get at the mental condition of the party, because both these characteristics of murder spring from the condition of the mind of the party. The law says we may do it by circumstances. We may do it by reason of the character of the act done; the manner in which it was done; and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what manner of act it is, bringing to bear upon the condition of facts of that kind the observation of men of *men of* mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors. As I have remarked

to you before, when malice aforethought exists, murder exists.
446 Now, let us see what is meant by that; let us get at an understanding of it if we can; let us comprehend it fully, that you may make a proper application of it to the facts in this case. If the facts show that it exists in this case, or that Joseph Wilson's life was taken willfully, and this other element surrounded the transaction, known as malice aforethought, the killing of Joseph Wilson would necessarily be murder, and nothing else. Now, what is this element of the crime? It is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse, in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it, or that it was done in the absence of mitigating circumstances."

Now, in this connection, let me remark to you that there is another state of case where, by having the directly opposite of murder given to us, in the shape of the definition of the law of self-defence and of manslaughter, and if we find from the facts of the case that neither one of these conditions exist, that is, a case of self-defence or manslaughter, we are thus enabled more readily to conclude that the condition which shows murder does exist, because there are but three conditions that can attach to a homicide, under the laws of the United States; one is the case of self-defence, the other is the case of manslaughter, and the third is a case of murder. And when we have these definitions, and we can not apply them and see that they do not exist in the case, we necessarily see that the other one does. So, by contrast, by comparing the one proposition with the other we are aided in arriving at a sensible conclusion as to what is the proposition that does exist. Therefore, it is not inappropriate, and perhaps is better in all cases, even where these *these* other conditions have not been invoked in the case, such as self-defence or manslaughter, as a state of case that applies, for the court to give this definition to you, not that
447 you are necessarily to apply them—you can not apply them unless a case exists to which you can make the application—but if you can not apply them, you can see by contrast whether the other state of case exists or not.

"And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us see again how the law defines it, and then again how the law tells us it may be found to exist. It can only be found by circumstances, because malice aforethought, like willful, is something which exists in the mind that is necessary to be found to make up the element of the case, and as you can not get into the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way; and there must be some rational way by which you can learn it; some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as a proper way, by which men arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration,

to see what was the nature of the thing done, whether it was an innocent act or a criminal act, and, if a criminal act, what was the nature of that criminal act.

"'Malice aforethought is the grand criterion which distinguishes murder from other homicides, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general—

When you find a case where spite or malevolence exists, from any cause, I don't care whether it is in resistence of lawful arrest or not, you have a case which is peculiar to that transaction and out of which set of circumstances you may find the existence of malice alone. It is a case, then, that means the same as the ordinary meaning of the word malice, and malice aforethought may grow out of that condition, as well as out of the condition where a killing is done without any just cause or without any provocation. In that kind of a case it is malice aforethought, because it is a wrongful and wicked act which results in death,
448 done without just cause or legal provocation. In the other case, whether it grows out of a special condition of things, as existing between two parties, and the killing is done because of that, you have a case where special spite exists, where there is special ill-will existing, where there is a special motive for the act, and, although you are not required to find motive, you find the existence of malice aforethought; if you find its existence the case is just that much more illuminated by that fact, is that much further illustrated by a showing of that kind of fact as existing—

the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in the law. Express malice is when one with a sedate, deliberate mind, and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, or former grudges, and concerted schemes to do him some bodily harm. So in many case' when no malice is expressed, the law will imply it, as when a man willfully poisons another. In such a deliberate act, the law presumes malice, though no particular enmity can be proven. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person, except of abandoned heart, will be guilty of such an act upon a slight or upon no apparent cause.

"'Malice is an intention to do bodily harm, a formed design to do mischief.'"

449 If a man has an intention to do such mischief upon the person of another—to kill him to inflict upon him such bodily harm as results in his death—to find out whether malice aforethought exists, you have to pursue the inquiry only far enough to know whether he had a right to do that act, or whether the other party at the time he was doing it was doing that which was so far provocative to take away the existence of that presumption of malice, or to take away the facts upon which the presumption of malice is found.

"'It has also been defined as a deliberate intent to kill. It does not necessarily import especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation.'"

That is, thought of beforehand. The doing of the act which kills must be thought of beforehand. But how long, you will inquire in this case? A minute, or a day, or an hour, or a year? Why, not at all. If it is thought of at a period, practically speaking, cotemporaneous with the doing of the act, it is premeditated, it is thought of sufficiently long. Especially is that the rule applicable in this day when a man with the rapidity almost of the batting of an eye or a flash of light may execute a purpose to kill. He may conceive a purpose, and instantly with its conception draw his deadly weapon and execute his purpose before you can bat an eye; the purpose is conceived and executed, and the man is dead, but yet it is premeditated, as shown in a case of that kind by the very drawing and presentation and firing of the gun. The law says, as I will read to you presently, that the deliberate selection and use of a deadly weapon is evidence of the existence of malice aforethought, provided the party had no right to use that weapon, or provided there is an absence of mitigating facts when he did use it.

"'It imports premeditation. Therefore there must logically be a period of prior consideration. But as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvellous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed, as a deliberate intent, though *after* no matter after how short a period of reflection, is none the less malice.'

"'Malice is an intent of the mind and heart; the doing of a wrongful act, without just cause or excuse, or in the absence of that which justifies the act or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and, in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite, or animosity, or a specific design to take life, or the purpose to do some other act that is wicked, malignant, and criminal in its nature, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces a formed design to do such mischief as may deprive a fellow-being of life.'"

Now, on this proposition here it is necessary to dwell for a moment, that you may the better understand what is meant by it when a man may not have a specific design, a particular design to kill another, but he has a design to do some unlawful act that he has no right to do, which from the way that he does it, the way that he contemplates doing it, a human life may be destroyed, and, as a matter of fact, a human life is destroyed in the execution of that unlawful purpose, such as a purpose to resist a lawful arrest, for that is an unlawful act. A man has no right to resist arrest; he must submit to it, and when he does undertake to resist it he is undertaking to resist a lawful act, which, from its nature and the way it is done, may produce death, because it implies the use of violence, the use of violence against legally constituted authority, authority that is undertaken to be asserted by an officer, and when it is

properly asserted it must be submitted to, and if a man resists and kills in the doing of that act, because he is executing an unlawful purpose, the law says that he is guilty of murder, although there may have been no specific design to kill, no specific design to take life. But you must find from the use of the weapon that there is a specific design to take life when a man uses a deadly weapon, such as a gun or ax, or any other weapon with which life can be easily and readily taken.

"'Malice is an intent of the mind and heart. There is never presented to the jury direct evidence of what was the intent of a man's heart at the time.'

"'You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is proof which shows the existence of the very thing itself that you are hunting for.'

"'If, for instance, it becomes necessary to show that A shot at B, and C comes in and says that A shot at B, that is positive evidence of it, positive proof of the shooting, of the fact necessary to be found, and because the evidence is so near to the thing itself it is called positive evidence of it. When it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstartial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances, in the shape of that which attends every transaction in life, which goes to characterize it one way or the other, which goes to show either that it was a criminal transaction or that it was a transaction that was honest and upright and void of crime.'

452 "'There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind are to us or to anyone outside of the individual exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and the feelings of his heart, by a careful study of the acts which he performs and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as expressed.'

"'It can not be demonstrated as expressed.'

"'We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result, is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, that it is not necessary to prove that such design existed at any

definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statements laid down in reported cases, and by text writers, that malice is to be inferred from the use of a deadly weapon.'"

I modify that by saying that malice is to be inferred from the use of a deadly weapon, in cases where there is an absence of any evidence showing that the party had a right to use it under the law of self-defence, or that he had a right to use it, and claim that the result produced by it was an act of manslaughter because of provocation offered by the party who was killed.

"'Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have a right and it is their duty to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in the act as being the only way that they can arrive at the conclusion as to whether it was an act accompanied by malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.'

453 "'Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand. And whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon for the purpose of using it in a wicked or unlawful enterprise, if it be one of that character, enabling him to consummate and carry out that enterprise, the selection of that weapon for that purpose is evidence of the existence of malice aforethought, is evidence of the existence of a purpose to do a wrongful act without just cause or excuse, in such a way as to show that the party who does it has a heart void of social duty, and a mind fatally bent on mischief.'"

That is the general definition of malice, or malice aforethought. It shows a purpose to do a wrongful act without just cause or excuse. I have given you the way you may find it. You go to the killing, and you ascertain how the killing was produced, the way it transpired, the way it was done. You see what character of weapon was used, and you see whether that weapon was used or prepared beforehand. The preparation beforehand means that the party got it for the purpose of using it at that time. He may get it instantly, and yet he gets it beforehand. It is not necessary that he should lug it about with him, bear it about with him as a man bears arms day after day, but, if he goes

and gets it at the place where it was, and then and there uses it, he prepares it beforehand, and you are to see whether it was
454 deliberately and willfully used at the time and in a state of case where the evidence shows that the killing was willfully done, if there is an absence from the case of that which shows that the party had a right to so kill, upon the law of self-defence, or that the killing was willful, but that there were mitigating facts attending it, the proof which shows it was done willfully shows it was done with malice aforethought, and in such a case as that the very same degree of proof that shows a willful killing would show a killing with malice aforethought. Then you are not confined, as I have already told you, to the circumstances immediately surrounding the killing, at the time of the killing. You have a right, and it is your duty to go to the defendant or defendants, and see the way he or they characterized it, by their conduct and their actions after the killing. If a man exhibits feeling of charity and consideration of mercy, as men do usually when justified, when they have done an innocent act, or done an act, even in the heat of passion, that they regret it immediately afterwards and all these acts of charity and these acts of mercy are things that are properly to be taken in consideration by a jury, to enable them to characterize properly the conduct of the party which resulted in the death of the man killed. On the contrary, if the acts of the party or parties after the killing were brutal, were unnatural, were wicked, were unmerciful, they are to be taken into consideration as items of evidence to enable you to characterize the nature of the act done
455 by the party or parties. It is a characterization of the act by his or their own creation. He or they characterize the act himself or themselves by his or their own conduct, and the cause of justice is entitled to have that conduct as so characterized considered in the light of his or their actions, when an honest and intelligent and law-fearing and law-enforcing jury are called upon to ascertain what was the character of the act that resulted in the death of the human being, and in the death of an officer. That is not to be hidden. You are not to cut off his act at the time of the killing and not to look at what he did afterwards, or what was done afterwards in connection with the dead body, or in connection with a party upon his own part in the way of his fleeing or his refugeeing from justice. These are all relevant circumstances that are proper to be taken into consideration by you, that you may correctly, according to the law and according to right and justice, designate the act done.

I think I have now given you the definition of these two elements that enter into the crime of murder. I have told you the way you may find them; that you may resort alone to the circumstances, that you must resort alone to the circumstances, as you can find them in no other way, because they are not facts capable of being shown by positive proof. If you find their existence in this case you are to characterize the case in accordance with the mandate of the law which commands you to find whether there is a crime and then to correctly name it.

I am not so sure from the argument of counsel in this case
456 whether there has been any invocation of the law of manslaughter or not. It is not necessary for the court, or is it the duty of the court, to wait for an invocation of that kind, but it is the duty of the court, or may be the duty of the court, to give it that you may see by contrast

whether a state of murder exists or what does exist in the case, though that is not the only consideration which prompts the court to give it. I will give you this definition of manslaughter, and I want to say to you in this case that if, under the law I have given you, and the facts in this case, murder exists, you have no right to drop down to manslaughter simply because you have the definition of it. Nor, if manslaughter exists, have you any right to go up to murder because I have given you the definition of it. Your duty is to find out exactly what the case is, to find if it is a crime, and to correctly characterize it.

The law says that manslaughter is a state of case that occupies a position midway between murder and self-defence. It is a crime, yet it is not so criminal as murder, and consequently is not punished to the same extent. It is the unlawful and willful killing of a human being. In a case where voluntary manslaughter would be the only kind applicable, it is the unlawful and wilful killing of a human being by the use of some kind of violence, it may be, as that used in a case of murder, but in the absence of all the facts and circumstances which show the existence of malice aforethought, because if the facts and circumstances show the existence of malice aforethought, you then have murder and nothing else. That is the definition given by the statute of the United States, and the common
457 law definition is about the same. It usually grows out of a state of case where there is a contest between the parties, an affray, a fight, where there is no purpose to kill on either side, no object of that kind is sought to be accomplished, no purpose of that kind on either side, but the men become inflamed, they become excited because of blows given one to the other, and in the heat of the excitement, when the mind is so inflamed they suddenly use violent means and take life. The law attributes that to a condition of passion and not to a condition where there is a formed design to kill, as evidenced where a man selects a deadly weapon for the purpose of using it. If a man goes into an affray with his hands or fists with his fellow man, with the manifest purpose, as evidenced by the preparation of a deadly weapon, to use in the affray a deadly weapon, if he has the opportunity, there is a preparation to do a deadly act, and that is murder. The act must have driven out of it all items of evidence which shows a premeditated design to kill, because if there exists a premeditated design to take life, there is nothing but murder in it. Now, there are other conditions out of which malice aforethought may grow besides these, and it may be that I may give them to you in the course of this charge, but I will now read to you what the common law says in a brief way of this kind of manslaughter. It is called voluntary manslaughter.

"Where upon sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they upon such occasion go out and fight in a field, for this is one continued act of passion; so also if a man is provoked by any gross indignity and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being se defendendo. In these and such like cases, the law
458 kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the ames footing of guilt the cool deliberate act and the result of hasty passion."

Now, that is the case out of which manslaughter grows. It is a case where the purpose to kill did not exist apparently before, but the mind was not capable of forming a deliberate and premediated purpose because it was inflamed and excited by the acts of the other party at the time of the killing, and when the killing grew out of that condition that is manslaughter.

The law of self-defense has been expressly invoked in this case by counsel. For that reason it becomes necessary to give that law. If the defendant or defendants in this case are entitled to that law they must have it, and you must make an application of it, and say to them that they have committed no crime, because that means that the act of the party is as white as the driven snow; it means that the party or parties had no intention or purpose of committing a crime, and that he or they did not commit any crime although he or they may have taken human life; it means that he or they took that life by the exercise of the great law of necessity, not under the law of vengeance, because there is no such law as the law of vengeance in the hand of the citizen, or in the hand of a court or a jury. It has no existence. It only exists in the mind of those who would slay wantonly and wickedly; there is no such thing to be recognized in tribunals of justice. It must be a defensive act pure and simple, and not an act of vengeance, not an act where the party killed because of a love of killing, or because of a malignant and wicked purpose to slay whoever may come in his road. It means nothing of
459 that kind. Nothing of that kind can exist under this law. It is a simple weapon placed in the hands of each and every citizen that he may defend himself. In cases of this kind where parties are on trial for having taken human life they can defend only against acts of a deadly character against acts coming from the hand of a party slain, of such a character, and of so impending a nature that they can not be avoided, and of the character or of the kind that death stood at the time and then and there confronted them or him, stared him in the face, to get rid of that consequence, to get rid of that result that it was necessary to take the life of the officer. That, in short, is this proposition, except as it may be modified by the second proposition of the law of self-defense. While these circumstances must exist to indicate a condition of that kind, yet they may be misleading in their character; they may be deceptive. We will now see briefly what is meant by this law, and what conditions must exist. The first propositions says that:

"A man who in the lawful pursuit of his business"—that means he is doing what he had a right to do at the time; he is doing what the law gives him a right to do at that time—"is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power."

That is the whole of the first proposition, yet there is a great deal in it. First, he must be doing what he had a right to do. If he was resisting an officer at the time he was not doing what he had a right to do, and he has no right to the law of self-defense, because he is doing an act
460 which naturally and probably, from its nature and the way it is done, may create a state of violence that may result in death, and when

a man undertakes unlawfully to do an act of that kind he is doing an act in the execution of which death may result, and there springs into existence the condition called "malice aforethought," from the doing of that act, although there may have been no specific or peculiar hate or animosity, or grudge or ill will, but he was simply doing it in resistance of an lawful arrest, and if he was doing that he was not then "in the lawful pursuit of his business." It says, again, that while in such lawful pursuit of his business he "is attacked by another"—in this case by Joseph Wilson "under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreatin' as far as he can, or disabling his adversary without killing him, if it be in his power." You see a man is required to discharge certain great duties under all circumstances, and especially is this law of duty incumbent upon him when he is put in that position, in the position of a judge sitting on the bench deliberating upon what the law is, and of a jury sitting in the jury box listening to the facts, and finding as cool'y, deliberately, and dispassionately as possible under the circumstances, what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that but he is the executioner. He finds what the facts are as a jury, and he makes an application of the law that he finds as a judge to these facts that he finds as a jury, he enters
461 up a judgment, and he then and there as a marshal kills in the furtherance of the judgment. Suppose that the judge of this court had that power, how long would the people of this land permit him to sit on this bench? Suppose that you, as twelve dispassionate citizens, had that power, how long would the people of this land permit that system to exist? Suppose that the chief executive officer of this Government, the President of the United States, presumably a discreet, wise, and just man, having no other purpose than the good of the people, had that power, how long would these people permit one man to exercise a power of that kind? Exercise it, too, when he wasn't confronted with acts that inflamed him, or that infuriated him, but exercised it when he was an intelligent man, and just man, as our Presidents have always been, and a fair-minded man. We have divided this power when it comes to be executed deliberately. We have a court that performs one office, and the jury another, and the executive arm of the Government another. Yet the law of self-defense puts all of these mighty elements of power into the hands of one man, and it may be in a given case, that he is not a very intelligent man, either; it may be in a case where he has sought to make application of it, that he is not a very discreet man, or that he is not a very dispassionate man, either, yet if the law applies to his case, if there is an application of that kind that can be correctly made to that condition, it is to be made, although there is a concentration of these mighty powers that would not be concentrated in any department
462 of the Government alone, but these great powers in a proper case are properly in the hands of the citizens. I say, however, the party is entitled to it if the condition exists to which it cane be made applicable. But if it does not exist, he is not entitled to it as a method of escaping the consequences of his act, because that would make the law a mockery;

that would say to the good citizen, "you abide by the law," and to the bad citizen, "you violate it and you escape by this avenue from this punishment." There is no proposition of that kind, and in every case where this law is invoked as in every case where the law of murder is invoked upon the part of the Government, you are to see to it that facts exist to which this law can be applied before you apply it. And it is not used as a mere shield or cover to cover up crime and conceal guilt. You are to understand its terms, and to make a correct application of it, to apply it to the fact as these facts have been proven. I will read again this first proposition.

"A man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant."

When? Suppose the facts exist that he is doing what he had a right to do, and he is attacked in a deadly way by another, can he kill in the first instance? Not at all. He must use other means to prevent that result if he can.

"He may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power."

463 He is required to avoid the necessity of killing if he can with due regard to his own safety. He must do that. If there is a condition where the other party at the time of the killing is doing an act of violence upon him, and he is in the right, and that would take his life unless he avoided it, and he can avoid it otherwise than by killing and he does not do it, that is a case where he would be guilty of manslaughter, because that is a failure to observe his duty and a use of the law of self-defense hastily. He must not forget that he is judge, jury, and executioner when he is sitting in that tribunal out in the wo'ds or country. He is therefore required to comprehend what this law is. He is required to know what the facts are that confront him and to make a correct application of that law to these facts, and if he does not do that, when he might do it, he makes a mistake in that regard, and he would be guilty of manslaughter. That again is a state of case where the deadily violence exists at the hands of the other party, and he kills because of that, but he could avoid the killing if he had exercised ordinary care. The other proposition is a state of case where, if it is not understood, it is very likely to mislead. It is simple to comprehend, but simple and brief as it may be, if it is applied mistakenly it destroys all the mighty protecting power of the law, because it is a fact—and what is the use of concealing facts in the discharge of these great duties—it is a fact of common knowledge within the mind of every man, that as a rule no man who commits the crime of murder, and is confronted by a jury of his countrymen, exists who would not avail

464 himself of the principle of this proposition if it could be resorted to, upon the mere whim of anyone. That is to say, if a man could conceive in his own mind that he had the right to kill, and kill upon that conception, every man who would be confronted with that kind of a charge would say that "I thought I had a right to kill," and there would be no protection; the law would be destroyed in its entirety; but there is no principle of that kind in the law; that is absurd; it is simply ridiculous;

it does not mean anything of that kind; it can not mean that; if it does, there is no law of self-defence in it, but simply a weapon of destruction in the hands of lawless, desperate, and wicked people. It means that at the time of the killing, there exists facts in the shape of overt acts of violence which are of a character indicating a deadly result or purpose upon the part of the party creating these acts. It may be that that deadly result might not ensue, yet the facts are of a character that indicate that it would ensue, and the party is honestly misled by the condition. That is what it means. Let us see what it is.

"When from the nature of the attack——"

What is meant by that? An act of violence done by the other party.

"There is reasonable ground to believe that there is a design to destroy his life, or to commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

I can best illustrate that rule by reading from the charge of a judge to a jury in a case tried seventy-odd years ago.

A shoots at B, within shooting distance of him. He holds
465 his gun just like a man does when he goes to shoot to kill, he pulls the trigger in the same way, and the gun makes the same sort of a report, and A is preparing to repeat the act, apparently, and B shoot' him and kills him. The law says that if he acted in good faith, acted under the belief that a condition existed and that he could not avoid the result that was going to ensue except by doing as he did do, he had a right to kill, although it turned out afterwards that A didn't shoot at him with the intention of killing him, but simply to play the fool, or frighten him, fired with an empty cartridge, but the gun had al' the appearances of a deadly weapon at the time, everything indicated a deadly purpose, and the law says in such a case the party would be excusable if he killed. But suppose that A didn't use any gun, didn't fire it at him, but B simply conceived that he might fire, and that condition might exist, and upon that conception of danger he took the life A, he would be guilty of the crime of murder. That is just the difference. It does not lay within the power of a man who is situated in this position where he acts as judge, jury, and executioner, to act without facts, to act without there is something upon which appearances can be based, or from which they can spring. There must be some act of violence, which, from its nature, from its character, the way that the party is performing it, indicates deadly danger, apparently, to the mind of a reasonable man. That is what is meant by this proposition. It does not mean that a man may act upon a bare conception of danger, or fear in his own mind, but that he does act upon that
which is in actual existence, in the shape of acts created by the
466 party slain, acts that, as it may afterwards turn out, were not of a character that would cause real danger to fall upon the party, or that the party had no purpose to use it, but because of an honest mistake, created or existing because of the act of the other party, and that was an act that had the appearance of deadly danger, when under such circumstances the law says he may be excused in killing. These are the propositions that make up the law of self-defence.

In this connection it is necessary that I should detain you for a moment to give you briefly the rights of an officer making an arrest, and the

rights of parties who are arrested, because it is claimedin this case that the party rightfully killed this officer under the circumstances claimed by him. The officer had a right to go out to make this arrest. He had a warrant, and that warrant commanded him to execute it. It was his duty to execute it in a lawful way, and that contemplates that whereever it is possible that he should do it in a peaceful way. It is true that a man has no right to kill in the first instance, in the execution of a warrant for a crime that is not per se a crime, but may be so by the statute, such as selling liquor in that country. You would have no right to kill in the first instance. He has the same right to stand on the defensive in the execution of that warrant as in any other case, and the officer from the time he starts on his mission, has the right to stand on the defensive. He is executing a high duty, a duty that is necessary to the very existence of the law, the Government, and the peace of our people, and the law throws around him a
467 panoply of protection, as long as he is in the right. If he seeks to execute that warrant by peaceful means, he is in the right. If the other party undertakes to resist his execution of it, the other party is in the wrong, and if he kills the officer while in execution of it, he is guilty of the crime of murder, because he is performing an unlawful act that may result in death. Now, the other party has no right to offer any resistance to that arrest. If, in this case, as is claimed by the defendant Downing alone in his testimony, the officer fired upon him while he was going to the house the officer was in the wrong. If that is the state of case, the defendant, if he could not escape that danger in any other way than by taking the life of Joseph Wilson, he would have a right to take his life, but you, as a matter of course, upon this proposition, are to look at the evidence in this case, to see whether or not the defendant in his situation is to be believed in his statement of the proposition, in the light of all the other facts, and in the light of his own subsequent conduct, conduct subsequent to the killing, or whether he is telling that which is a falsehood, whether he misrepresented the case. Now, sometimes conceptions are formed in the minds of jurors that there is a degree of sanctity thrown around a man charged with crime, of such a character as that his word is worth more than the word of an honest citizen who is not charged with crime. That is a grave blunder, a grave mistake. He enters upon the trial of the case, and goes into this witness box just like anybody
468 else, surrounded by the facts and circumstances that he may have created, and if his statement is not probable or reasonable in the light of the other facts in the case, you may disregard it from that consideration alone. If it is not a statement that you can believe because of his position in the case, and his interest in the case, you may disregard it for that reason alone. You are to see what the position of these parties were. If it is true that this party had been arrested, and he had been peaceably and quietly in a gentle way permitted by overindulgence of the officer, and overconfidence towards the defendant, to go to the house to get a saddle, and he went there and got his gun, and fired upon the officer, that is a case that is nothing else but murder; it can be nothing else. There is nothing mitigating in that.

In this case it is charged that two defendants did this act; that they so participated in that which resulted in the death of Joseph Wilson;

that they both are guilty of whatever crime has been committed. It becomes necessary in this connection that the court should tell you how, under the law, more than one person can commit the same crime. Any number of persons may commit the same criminal act, and be all equally responsible for it. First find if they all participated in the act which resulted directly and immediately in the death of the party. I desire you to note carefully the words I am using. If they did participate in the performance of that act, directly and immediately, and death ensued in a criminal way, they are all criminals. That is the first proposition.

469 Second. If one of them, after they had formed a conspiracy or agreed to do an unlawful act—and that is what a conspiracy means—they had entered into an agreement to take the life of this man, and that agreement may be entered into in more ways than one. A number of persons may agree to do a criminal act expressly, by so many words, understanding what they are about to undertake, and they all act upon it in furtherance of that undertaking. Under such circumstances they all have joined a conspiracy at that point, that is, in the inception of it, in the first conception of it. They may join this conspiracy after the first conception of the purpose upon the part of one. One man may conceive a purpose to kill another, and after he has conceived that purpose he may have done some act looking towards killing him, and another person, with a knowledge of the character of the transaction and the character of the purpose undertaken, subsequently joins in the undertaking, and it is the same act that indicates unity of mind upon his part with the mind of the party who has conceived the purpose; in other words, it is evidence of unity of purpose, evidence of a joinder upon his part in the unlawful undertaking, and although that act may not of itself directly result in taking life, it shows a joinder of a party in the purpose of doing that which may take life, and if the act does take life, the taking life is the act of the party. But if the act does take life, the act is committed by the party in the first instance who joined the result if the death is an act showing unity of purpose upon his part to produce the death of the party assaulted. Now, then, if two parties, one of them with his

470 own hand does an act, and the other is present aiding or assisting or abetting or counselling or advising in doing it in any way, he is responsible for the act of the other. He is responsible for it if he joins him afterwards, and it is an act of his own that result in the death of the party, the party who may have done the first deadly act, showing a purpose to consummate the latter object, they would be both united in the first common criminal enterprise.

These propositions that I have given you mean that the party was present at the time of the killing, and while so present rendered some aid or assistance, or gave some counsel or advice looking towards the consummation of that deadly result, and he, when so situated, aided, or counselled or advised, or even by his bare presence exerted what may be called a mental influence upon the mind of the party who did the act, and he did that in pursuance of a common understanding that the act should be done by them, he is rendering aid when he does that by his very presence alone, the law says. Now, again, the law says that if a man is not actually at the place of the crime, but constructively or legally present, and that means he is so near to the place at the time it was committed as to

render assistance or to give advice or counsel, or in some way abet the crime, that he is then at the place of the crime, legally speaking. And if he is either assisting, advising, or counselling, or abetting the crime, he is participating in it with the other party. And if he is at such
471 place for that purpose, but does not as a matter of fact do anything because it is done without his aid, but he is prompted by the same purpose that prompts him who he does do something towards its consummation, the law says he is then allied to the criminal purpose; the fact of his going to that place and holding himself in readiness to assist others doing it connects him with the criminal act. But if he is actually at the place of the crime at the time that it is done for the purpose of doing some act looking towards its consummation, or aiding, or rendering some assistance by his bare presence alone, the law says he is joined in the act, and he is responsible. Of course if he is not at the place of the crime, though he may join in it after the crime has been completed and committed, after it is all over, he would not be responsible for the act of killing.

That is how a number of persons may be guilty of the same act. If one of the defendants shot Joseph Wilson, and the other committed a violent assault on him with an ax while he was yet alive, and the violent assault with the ax resulted in taking his life, if that was the injury from which he died, or if he died from the infliction of both injuries jointly, such participation in the act would make both defendants responsible, when done under such circumstances, although it might be that the wound by shooting didn't actually produce his death, but it was produced by the assault with the ax, or that the act of the one who assaulted Wilson with the ax may not have killed him alone, when considered alone, but that when considered jointly or in conjunction with the act of shooting has-
472 tened his death, it would under such circumstances contribute to that result. If that act of that kind was done by Shade under such circumstances that would show a joint participation in the act of killing by Shade, as well as by the party who shot. It would show such a state of case as would show a common criminal purpose to produce the same result, and show a contribution to that purpose by the making of a deadly assault with the ax, which contributed to his death by hastening it, or which may have produced it alone. And in the other case, if the deadly act of violence was committed by the other party with a gun, but as committed alone did not produce his death, then the fact of such deadly act having been done shows a deadly purpose on the part of the other party, shows a joinder on the part of the two to produce the same result, and the doing of the criminal act was contributed thereto. All are held responsible whenever the will of each contributes to the result, and they do the same act in the execution of this will. In this case the result which must be contributed to is the death of Joseph Wilson. The will of each contributes to the result when either one of the conditions exist which I have named. The act done by a party immediately after the result, as, for example, he who attempts to strike with a deadly weapon one who is at the same time struck by another with a deadly weapon is a joint principal in the offence. If it is that Sam Downing, or Sam Hickory, as he is sometimes called, shot Joseph Wilson, and afterwards Thomas Shade

struck him on the head with a deadly weapon, to wit, an ax, or any
473 other weapon of like character while Wilson was yet alive, struck him on the head in this way, this would be evidence tending to show that Shade contributed to the result, and consequently he would be a principal in the killing of Wilson, and he would be jointly responsible for it.

I have now told you how more than one man may do the same act.

In this case an alibi has been invoked in favor of Shade. That means that at the time of the killing he was so far away from there as that it was not possible for him to be there at that time and to contribute to the result or to take part in it. If he was so near to the place as that he might in a short time be in different places, at the place of the killing, and shortly thereafter at the place where the alibi locates him, it is not an effective alibi. First, as to the alibi: To make it efficient it must so far remove him from the place of the crime that it is physically impossible for him to be there and take part in it. It is important that you should note this character of defense. It is a character of defense that the party has a right to rely upon, and has a right to invoke, if it exists, in his behalf. If it does not exist he can not use it as a fraud or a deception. When he undertakes to use it in that way it is simply a weapon that turns against him. It works against him rather than for him, because the law says if a man undertakes to use false evidence knowingly and understandingly he is doing it because of the weakness of his own case,
474 on the principle that every man who has arrived at the years of discretion knows the truth is the most powerful agency for the protection of life that can be invoked, and he instinctively flies to the truth when it is in his favor because it will shield him, and he depends upon it and it shields and protects him. Therefore, it is important to note that if a man resorts to falsehood when he invokes a principle of that kind it is evidence of the weakness of his case, and it is a foundation for a presumption against him.

Now, let us see a moment as to what the character of this defense is.

"This defense of an alibi is wholly inconsistent with the allegation in the indictment that the defendant then and there took the life of Joseph Wilson, and the law says this defense is of all others the most decisive when duly substantiated or established, yet it is an easy defense to fabricate and the most difficult to be disproved. An alibi that is not circumstances as proof amounts to but little."

That is to say, a man must be able to give you reasons for knowing why a certain thing occurred at a certain time and at a certain place. The occurrences of life are so similar, and days are so much alike, and what transpires on them are so similar that unless we have something standing out beyond or above the ordinary occurrences of every-day life we are not apt to know one day from another; we are liable to confuse one day with the other, and we may do it with ease, and we may do it falsely because of that, and the law says the witness must be able to give some
475 circumstance, some reason, to enable us to know, to see that he knows what he is talking about. Therefore, as I have read to you, if an alibi is not circumstanced it amounts to but little. It is a statement of an affair about which men may be so easily mistaken.

"An alibi that is not circumstanced as proof amounts to but little. Its value depends upon the way it is circumstanced; that is, the witness or witnesses must be able to give you a detailed statement of such circumstances as to lead you to believe it is true. A witness may be able to give you a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be either in applying them purposely or by mistake to a different time or date or hour than that on which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done willfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defence of this kind, a defence of that nature is often resorted to, and is often attempted to be sustained and made effective by fraud, subornation, and perjury. Because a defence of this nature can, with comparative ease, be made effective by means of fraud, perjury, and falsehood, and the ease with which defences of this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. In considering the strength of evidence necessary to sustain the defence of alibi, it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of Joseph Wilson is in direct conflict with that which tends to prove that he was at the place where the crime was committed, at the time it was committed, and actually assisted in its commission.

"In this conflict of evidence, whatever tends to support the one tends in the same degree to rebut and overthrow the other, and it is for you to decide where the truth lies."

That is one of the defences set up by the defendants in this case. I have given you the definition of these two defences, and I have admonished you sufficiently to enable you to look at them in an intelligent way. You are to look at this defence of alibi to see whether it exists in this case, to see whether it has been established by the testimony in such a way as that you can depend upon it. In this connection it is important
476 for you to see whether or not the defendants, or either one of them, had a motive to commit the crime, not that that is necessary to be found, but if you find its existence you are then to take it into account as a proving fact in the case, as an item of evidence. Secondly, whether they had an opportunity to commit the crime, or either one of them had. Thirdly, whether they had the means to commit the crime, or either one of them had such means. You look at the character of the wounds inflicted, and the consequent nature of the weapons used, whether these weapons were at hand, as shown by the evidence. And then what are the other circumstances pointing towards the guilt of the defendants, or either one of them. After you have taken into consideration all these propositions you are to look at the case to see what facts the defendants have been able to establish in the defence that have a tendency to eliminate the facts offered by the Government, to see if the accusing facts are so weakened as to so leave the case in a condition where it is not proven beyond a reasonable doubt.

We now come to the evidence in the case, and we have a right, and it is our duty, to draw presumptions from this testimony. We have a right

to take into consideration the facts that have been offered in this case, immediately attendant upon the killing of Wilson, and subsequent thereto. The law says that flight is a foundation for a presumption of guilt in the first instance, and that arises from a consciousness of the act done by the party; he is more conscious of the nature of the act than anybody else, because he knows it better. He knows exactly all the facts and cir-
477 cumstances, and if he does an act that is in self-defence, or if he does an act that is even manslaughter, but especially an act that is purely defensive, it is a rule of human conduct that is general in its character that a man does not fly from that act, or from a full development of it, because a development of it protects him. He goes to where he can have it investigated, if he acts naturally, and in accordance with the usual rules of human action. If he takes an opposite course, if he flees into distant parts of the country, or conceals himself while in the country, the fact of his so going to another part of the country, the fact of his concealing himself so he can not have his act investigated, the fact that he keeps it from the knowledge of those who are immediately around him, if you believe that he did so, are evidences of consciousness of guilt on the part of a party who does an act of that kind, and unless he has offered an explanation for this unusual and unreasonable and unnatural conduct, in the light of innocence upon his part, you are to take such conduct as the foundation for a presumption of guilt against him, for a presumption that it was a consciousness of guilt that caused him to evade arrest, and to flee from the jury and from the court, and from the officers. I say unless he has offered evidence that is reliable, that is credible, that you can believe, some reasonable theory, outside of thos' I have given you, for his actions, you are to take it as a foundation for a presumption against
478 him. The law says that there are many presumptions that are to be indulged in in cases of this kind.

When a man conceals the fact of having taken human life, or makes an effort to conceal it by hiding the body, or removing it to a place where it is not likely to be seen or discovered, before decay sets in, the law say that concealment is evidence of guilt, because it is not the way that innocent men usually do; it is not the way that a man acting in self-defence usually does, and when a man does it he puts himself outside of the usual actions of reasonable men, and because he does that, he is required to make an explanation that is reasonable, and that will lead you to believe that he was still innocent when he did that. And until he does that, the fact of concealment is the foundation for a presumption against him, and it is a fact, like the fact of flight, that you have a right to take into consideration, to enable you to characterize the act. Because it is a fact that he has given you that he has afforded you an opportunity to take hold of, that you may see the transaction in the light in which it really existed. We now come to the other circumstances. When a man kills in self-defence, and I am only stating a self-evident proposition with which you are all conversant, he not only seeks vindication, but vindication as soon as possible; he not only fails to conceal the evidence of such an act, but he wants the fact known at once; and a man of that kind may be one of the best men in the country, he may be one of the most charitable men, he may be a man whose heart is overflowing with mercy and kindness, and when his enemy, because the
479 man becomes his enemy when he has to kill him in self-defence, when he is laying in death, prostrate at his feet, his pity, his sympathy

goes out for the man and for those who may be connected with him, and he is ready and willing to fly to his assistance, to the amelioration of his condition, to give him aid, and to give him comfort in his dying moments, when he is conscious that so far as he is concerned that he has done no act except that which was righteous and just under the law. And this principle of self-consciousness is a principle that to a greater or less extent permeates the mind of all men, I care not how savage or how brutal the man may be. If he has done nothing but an innocent act, this inward monitor, called conscience, teaches him the nature of that act and he acts in accordance with that teaching. He is, therefore, not usually the man who characterizes his acts of killing by acts of unnaturalness, wickedness, brutality, and of great moral depravity, 'nd a total disregard for the rights th't even belong to the dead—the right of decent Christian burial, the right of being put away in the bosom of mother earth, as decent and reputable men are put away. He is not willing to deny that, and he who does, by his brutality, by his unnaturalness, by his wickedness, by his exhibition of a total disregard for the rights of the living or the dead, does acts of that kind, it is your solemn duty to consider these acts when you come to characterize his killing, when you come to name what the crime is. They are acts outside of the usual rule of conduct governing men who kill in self-defence, and which govern men who are conscious of the fact that
480 if they have killed, they have only killed because provocation was offered by the other party at the time of the killing. They are characteristic, or they may be characteristic, of a killing that is brutal, that is wicked, that has malice aforethought attending it.

And it is your duty, in considering the case, to see whether that element exists or not, to take these things into account, because, as I have already 'old you, you are not to break off in your investigations when the life went out of the body of Joseph Wilson. You are to see what this party or these parties did with the remains of that man after he was dead, that you may the better be able to characterize their act and to believe their statements when made in your presence as witnesses. Then, again, the law says that the truth is the most potent factor that a man can invoke, and it is not only the law of the land, but the law of morals, that says so; the moral law says that truth is consistent at all times; it is harmonious. A man tells a thing to-day that is inconsistent with something he told yesterday; that is evidence of falsehood upon his part, because if he has told the truth it must harmonize with the statements of like character upon a like subject made yesterday. Therefore, if a man makes a different statement about an occurrence, tells how it occurred in a different way, makes a statement upon the witness stand different from that which he has made at some other place, and that is contradicted in material parts by reliable witnesses, the fact that he made statements that are contradictory is an item of evidence upon which you may found presum'tions against him, for the truth is harmonious. These very inconsistencies of state-
481 ments become facts that the jury have a right to take into account in passing on the question as to the guilt or innocence of the parties.

Now, as I have already told you, you have two theories asserted in this case, one upon the part of the Government and one upon the part of the defense, as to the manner of this killing. You have the theory asserted by Thomas Shade that he was not a participant in the killing, and had

nothing to do with it. It is your duty to see which 'f these theories are true, which is correct, as shown by the light of this evidence. Where there is a conflict in the theories, you must see where the truth lies, and you can best see it by taking into account these inanimate circumstances that go to characterize the act, because they are motiveless. You can not bribe one of them. You can not offer them a horse or money, or any other consideration, that would induce them to lie; but you may say that they come through men that may be influenced by the source through which they pass. That is true, but when there is a concurrence in the circumstances, if you have circumstances that are undisputed facts in the case, because proven on the part of the Government and admitted by the defendant, then you have undisputed circumstances, you have a set of facts which it is your duty to take into consideration, above all other facts, to enable you to characterize this act, to show what it was, because in a case like this, coming, as the circumstances do, in a way where they are undisputed, where there is a concurrence in the correctness of the circumstances, where there is an entire agreement as to their truth-
482 fulness, then there can be no question about the source through which they have passed being corrupted, but they must come before you as true circumstances. These, then, are to be looked at by you, and they point the way that you may safely follow; they are your guide board of truth, pointing to a conclusion that you may safely adopt, when you come to characterize this killing.

It is your duty, then, to take into consideration, above all other things, the undisputed circumstances, because they come to you as items of evidence in such a way as that you may receive them as having the very strongest proving power. If they have a tendency to establish a proposition of a certain character, a proposition showing innocence, that they have a tendency to establish that proposition by evidence that is indisputable. On the other hand if they tend to show guilt, there is a tendency to show the truth of the proposition by the very strongest kind of evidence, and by evidenc', too, that can not be influenced, and the source through which it comes can not be questioned. Self-interest operates on the mind of the defendant in the case to a certain extent, and in a case like this above all others, because of the penalty he must pay if he is found guilty. He knows that; he is an attitude of knowing the result that will follow a conviction of the crime. When we are surrounded by such a state of case, the rule is that a man will give the whole world to save his own life. Then it is probable that he may give away the truth to save it; it is
483 probable that he may relate falsehoods to save it; it is probable that he may conceal the truth; it is probable that he may resort to that which is not true, to rely upon that to cover up his case, if the case is of the character that he is likely to be affected seriously by the result of it. You are, then, to look at all these circumstances. You are first to see that the source through which the circumstances come is true.

In passing upon the weight of evidence of any kind you are to see whether the source which produces that evidence, or through which it comes, is a true source. You are to see whether the facts offered are consistent which tend to prove the proposition, or whether they are inconsistent. You may discover their weakness or their strength by looking at their very consistency or inconsistency and viewing them in this light. You take the testi-

mony of the witnesses; you first find out what is true in the case. That is your most difficult duty, because the motive of witnesses sometimes is to cover up or conceal, is to prevaricate, to keep the truth from you. You are to find your verdict from the truth. In passing on the truthfulness of the statements of witnesses you are to consider, in the first place, whether they have been impeached or not. There are many ways of impeaching witnesses. A man may be impeached, by his actions before you, or by the inconsistency of his statements, by their very unreasonableness. He may disprove his own evidence in that way. He may disprove his evidence by making statements inconsistent with those made on the stand. When impeaching testimony comes to you in that manner you are to find
484 out whether it is got up for the occasion; to find out whether it was manufactured since the trial commenced; evidence made by men who are prying and sneaking around to get a witness to say something that he may come on the stand and misrepresent it. You are to look with caution on testimony of that kind when you are passing upon whether a witnesses or witnesses have been impeached. If it comes to you in a suspicious manner, if it comes to you through witnesses who are not brought here to prove any specific fact, but who have been lurking around, tracking after the Government witnesses to find out what they might get out of them, that they might get it out of them and produce it against them, you are to receive such testimony with a degree of care, and you are to see whether it is true. You are to consider all these things that I have named. You are to consider the appearance of the witnesses that are sought to be impeached, the character of their statements, the nature of the evidence given by them, their apparent interest in the case, and all of these things, in arriving at the correctness of what they have given you.

In passing upon the testimony of the impeaching witnesses, you are to take into consideration these things I have named to you.

Admissions have been offered by the Government, in this case, made by the defendant, and especially by Shade, as to his connection with this killing. The law says they are evidence; they are legal testimony; they are to go before you in the shape that you can believe them—that
485 is to say, you are to be satisfied that they are correctly represented; that they were first made and correctly represented as made. If they have a tendency to implicate the party, they are to be considered against him. If they do not have that tendency, although correctly proven, they are no proof against him. The law says when an admission is offered you are at liberty to reject such part of it as you may consider unworthy of belief, and believe such parts as you consider may be believed. But the law says you are at liberty to believe that which is against the party making that admission, and to disbelieve that which is in his favor.

"But if, after the whole statement of the prisoner is given in evidence, the prosecution can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration precisely as in other cases where one part of the evidence is contradictory to another, for it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner and reject that which is in his favor, if they see sufficient grounds for so doing. If what he said in his own favor is not contradicted by ev-

idence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury. But they are not bound to give weight to it on that account, but are at liberty to judge of it, like all other evidence, by all the circumstances of the case."

That is the rule as to admissions made.

There is another principle of the law that I was about to overlook which it becomes necessary to give you. Of course the idea of joint participation in this killing by these parties implies what the law names as a conspiracy—that is, the undertaking to do a criminal act or to contribute to its being done. It is the undertaking to do a wrongful act in this case, the act of killing Joseph Wilson. It takes at least two persons
486 to enter into a conspiracy and to make it up, and the law says that if it is joined by the two, one man may start an enterprise that is criminal and another one may join it after it is started when he wasn't in it at the conception of it, and the conspiracy wouldn't take place until he did so, but he may join it either by an express understanding or do it tacitly, with an understanding of what was to be done, and go on and contribute to the result. That is joining it. The law says that whatever is said or done by any one conspirator in furtherance of the common, unlawful, criminal enterprise, in this case the killing of Wilson, during the existence of that conspiracy after the parties have joined it, until they separate from it, is binding upon each and every one of them. If they have all entered into a conspiracy, whatever one says, in legal contemplation, they all say, provided it is said in furtherance of the common design.

You twelve gentlemen and myself agree to kill a man; we go out, and we enter upon the mission of killing. I give some directions to some one of you, and in consequence he is killed. Now, that direction given by me is a direction given by the whole twelve of you. It is a direction given by every man in the conspiracy, and the act of shooting done by one is the act of the other eleven, and the act of every man in that conspiracy, while that conspiracy is being executed, is the act of all. They are all bound together for the same criminal thing; they are all seeking the same criminal purpose; they all, consequently, in legal contemplation, speak with one mouth and strike with one hand. Now, that is the effect of an act done, or word uttered, by a conspirator, in further-
487 ance of a conspiracy. If the purpose of that conspiracy is over, in this case if the purpose of it was to kill Wilson, and that was consummated, and if it was true that the parties had impliedly agreed to conceal that crime and bear off the body, in the way described, the continuance of the act there would still be a continuance of the same conspiracy, because that is the immediate consequence of the killing; but when that was done that was an end of the crime, that was an end of the doing of that act, and whatever may be said in the way of admissions or declarations as to who participated in that killing, or as to how it was done, or as to the way it was done, or who participated in bearing off the body, provided that was a continuance of the act of killing, would not be binding upon any other party. In this case, whatever may have been said by Downing in this letter to this woman, if that was his letter—you are to be satisfied of that first—would not be binding upon the other party. It was only admitted as evidence binding on Downing, as an admission that he did the act of killing, and whatever other declarations he may have made

after the killing was over would not be binding upon the other party, nor would the declarations made by the other party be binding upon him, because after the conspiracy is completed and consummated by the doing of the act that it was formed to do, then every man who may have been in the conspiracy is alone held to a responsibility for what he does or says after that as affecting him. That is the principle of the law as affecting admissions or declarations made by any party after the crime has been committed, after the act has been consummated.

There are but a few more words to say to you in this case.
488 You are the judges of the credibility of these witnesses. You are to take into consideration the rules that I have already given you. You are to consider the testimony of each and every witness in the light of its probability, in the light of its reasonableness, and in the light of its consistency, and in the light of the facts, and you compare the usual human action and human conduct with the conduct described by this evidence, to see whether they correspond, or whether the conduct described by this evidence is out of line of the usual occurrences or acts done by men under like circumstances, as described by these witnesses. If it is out of line with it, there must be some explanation of that inconsistency' or it remains a fact that may be taken into consideration against the party charged. You are men who have arrived at mature years, at mature judgment; you have observed human conduct in the light of a given state of facts or circumstances. For instance, you know conduct in the face of guilt is different from the conduct of men in the face of innocence, and that goes far to characterize a case as to whether it is one of guilt or one of innocence.

Now, then, upon the testimony you are to bring to bear this wisdom which you have gathered by observation upon the conduct of men. You are to apply it as sensible men, as just men, to the facts in this case to enable you get at the truth. When you come to the testimony of the defendants you are to consider their appearance before you, whether their evidence given on the stand is in harmony with facts given by them at other times, whether or not the facts are so reasonable, so con-
489 sistent, so probable in the light of usual human conduct, as that for that reason you can believe them, and in passing upon them you are to consider their attitude in this case, and their interest, and their consequent great motive, the greatest motive that can ever operate on the mind of man surrounds them, or is operating on them. It is probable, it is reasonable, it is but natural, that they may be influenced by that motive. Therefore, you are to consider the testimony of such a witness as you would consider the testimony of any witness exactly in the position they occupy when giving that evidence. That is what is meant by viewing the testimony of each witness, and the way that the law directs you to do it, in the light of their condition, and the light of their motive in the case, and above all in the light of the other facts that you find to be true.

If you are satisfied from a proper consideration of this evidence and after you have eliminated the true from the false, if you find false evidence here, and they are contradictory statements here, they are flagrant inconsistencies, indicating that somebody is telling that which is not true, but you are to find out what the truth is, and when you have found it you are to say whether or not it is sufficient to satisfy your minds beyond a rea-

sonable doubt that crime exists here. If you are satisfied to that extent that crime exists, and that crime is murder, your duty is to convict these defendants, or either one of them, as you find either one of them
490 guilty, or one guilty and the other not guilty. If these facts are not true, are not sufficient to satisfy your minds beyond a reasonable doubt of the truth of the charge, your duty is to acquit the defendants, or defendant, as the case may be. It is not required that this whole thing is to be demonstrated. You can not do that. One actor is gone. He was carried from the place where he was killed and ignominiously put out of sight, where it was presumed that he would not be seen. He was not permitted a Christian burial. He is not here, except as he is represented by these facts and circumstances connected with the taking of his life, and his funeral ceremonies. They are here to speak for him one way or the other, to see whether it was a criminal act upon his part in making an assault upon the defendant, Downing, or whether the defendants, Downing or Shade or both of them, are criminals in wantonly and wickedly taking his life. He can only speak to you by these competent facts and circumstances that were left around that house and that place of killing, and that made that bloody trail through these rooms and that trail that followed his body to the place where he was hurled to a disgraceful and ignominious burial. They are the only kinds of evidence that can be resorted to. That is the case of the people of the Government of the United States presented to you. If these facts are of sufficient force, though it may be they are not sufficient to demonstrate this occurrence, but if they are of sufficient force to show that it occurred in such a way, as that it was criminal, and that you would believe it if it was presented to
491 you outside of the jury box, as citizens, in the light of the law defining the crime, defining the defense that has been invoked by the defense, in the light of the facts in this case, as reasonable, and just, and impartial men, having no other interest in the case than to arrive at a true conclusion, and to form a correct verdict; if situated as citizens you would believe that the truth is established, you must believe it here, because it is proven to that degree of certainty that the law says is sufficient.

Let us see what the law says, quoting from a jurist who used these expressions in a charge to a jury:

"You are not at liberty to disbelieve as jurors, when you believe as men; that is, your oath imposes on you no obligation to doubt, when no doubt would exist if no oath had been administered.

The law contemplates there are great duties on you as citizens. You are not to believe him guilty of a crime unless you take a reasonable, rational, dispassionate view of the case. Then your duty to yourselves and to your fellow men commands you to uncover crime and punish criminals, and commands you to believe him guilty when your mind is carried to a certain extent, and when proven to that extent the law contemplates there is driven out of the case all doubts for which a good reason can be given. The kind of doubts that you are to regard are reasonable doubts, a real substantial doubt of guilt, flowing naturally and reasonably to your minds from the whole testimony in the case, not one that you strain for, not one that you hunt after, not one that is
492 founded upon a mere conjecture, not one that is insufficiently supported by the evidence, but a well grounded doubt that comes to

your minds naturally from the proof in the case, and leaves them in that condition where you are not able to say that you have an abiding conviction to a moral certainty of the truth of the charge. To a moral certainty means certainty of that character that you would believe the truth of the proposition, and act upon that belief, as a citizen, if you had heard this whole case just as you have heard it here.

Gentlemen, you will understand from this law that it is your duty first to find if a crime exists, and, secondly, to find what the character of that crime is, and, thirdly, it is your duty to see whether these defendants, one or both, were so connected with its commission as to make them guilty. If you find that they both were connected with it, your duty is to convict them of whatever that crime is. If you find only one was connected with that crime, under the law he is responsible for it, and it is your duty to acquit him and convict the other.

I submit the case to you. If the law has been violated, if it has been outraged, if it has been trampled under foot, if the act was done and as done was characterized by inhumanity and brutality and wickedness, and you are satisfied that that state of case is made out that establishes the crime of murder, I ask you to brand it as such. If you are satisfied that that offense does not exist, but the other, then I ask you to name
493 it as such. If you are not satisfied that either of the conditions exist, and these defendants, or either one of them, or both of them, are guiltless of any crime, it is your duty to say so. I submit the case to you. I ask you to uphold and vindicate and enforce the law, whatever result may be produced by such enforcement. If you find the defendants guilty of either crime, or either one of them guilty, you will specify under what count you find them guilty. You may retire to consider of the case.

Mr. BARNES, (of counsel for defendants). We have drawn some exceptions to the charge of the court, which we would like to file.

The COURT. You may pass them up to the court, and the court will consider them filed, within the presence of the jury.

(11:15 a. m.)

494 To which charge the defendants at the time offered and filed the following exceptions:

1st. The court's criticism on circumstantial evidence, denouncing persons who are slow to act on circumstantial evidence as fools and knaves.

2nd. Because the court instructed the jury that the defendant, Downing, or the party who invokes the law of self-defense, at the time of the difficulty puts himself in the place of the judge that lays down the law, of the jury who passes upon the facts and enters up judgment, and of the marshal who executes the sentence, and has centered in himself the whole power of the Government or people, without telling them that he is not required to look at the case and the occurrences with the same coolness and deliberation that a court and jury would do in investigating the charge against him, and that if in this case, as claimed by him, the officer Wilson fired off his pistol in the first place when his back was to him, and led defendant, Downing, to believe that the officer was assaulting him, or the officer did then and afterwards assault him, then all the circumstances of excitement, agitation, apparent or real peril that surrounded him, and that

may have caused him to misjudge as to the purpose of Wilson, or as to the assault, or to misconceive as to his exact rights and duties are all to be taken into consideration.

3rd. Because the court in commenting upon the facts in the case gives undue prominence to the inculpatory and not sufficient prominence to the exculpatory facts, and assumes that a portion of the witnesses are brought to court to hound and break down a part of the Government witnesses by false testimony. And because the charge as a whole is prolix,
495 abstract, argumentative, and misleading, and because said charge, though taken down by the court stenographer, was delivered orally by the court.

Which objections to said charge were overruled by the court when it passed on the motion for a new trial, to which ruling the defendant Hickory at the time excepted.

Whereupon the jury retored to deliberate and afterwards returned into court the following verdict:

We, the jury, find the defendant, Sam Downing, alias Sam Hickory, guilty of murder as charged in the first count of the within indictment.

(Signed) F. H. BRIDGES, *Foreman.*

Whereupon the defendant, Sam Downing, afterwards, on Sept. 12, 1892, by leave of the court, filed his motion for a new trial, which motion was in the following words and figures, to wit:

In the circuit court of the United States for the western district of Ark., August term, A. D. 1892.

UNITED STATES
vs.
SAM DOWNING AND THOMAS SHADE. } Motion for new trial.

Now comes the defendant, Sam Downing, and moves the court to grant him a new trial upon indictment No. 29, charging him with the crime of murder, upon the following grounds:

First. Because the court erred in its charge to the jury in saying to them in reference to the declarations of persons who did not believe in convicting upon circumstantial evidence that they were the declarations either of fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is or to perform the ordinary duties of citizenship. And in further saying to them,
496 "As a matter of fact the great conclusions of life upon which you act, and in which you believe, which control your destiny, which fixes your code of morals, and which governs you in life and fixes your faith in eternity, are conclusions that you find only upon circumstantial evidence.

"You can find them in no other way. You see it is little understood, the proving power of this kind of evidence, its power and the frequency with which it is used in coming to reasonable conclusions by sensible men."

Second. Because the court erred in that part of his charge in which, referring to the duty of the defendant who invokes the law of self-defense (in this case Sam Downing) and the conditions under which he may lawfully kill his assailant, when he says in substance that he must be espe-

cially cautious because he is put in the position of the judge sitting on the bench deliberating upon what the law is and of a jury sitting in the box listening to the facts and finding coolly and deliberately and dispassionately what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that, but he is the executioner. He finds what the facts are as a jury, and he makes an application of the law that he finds as a judge to these facts that he finds as a jury. He enters up a judgment and he then and there as a marshal kills in furtherance of the judgment.

And because the court erred in the subsequent part of the charge on the same subject in enumerating and illustrating the powers concentrated in the defendant and the manner in which he could rightfully exercise them.

Third. Because the court erred in his charge to the jury in commenting upon the facts in the case in such a way as to give undue promi-
497 nence to the inculpatory and not sufficient prominence to the exculpatory facts, and in assuming that a portion of the witnesses for the defense were brought to the court to hound and break down a part of the Government witnesses by false testimony.

Fourth. Because the court erred in its charge generally by making the the same prolix, abstract, argumentative, and misleading. And because said charge, though taken down by the court stenographer, was delivered orally by the court.

Fifth. Because the court misinstructed the jury as to the law of the case.

Sixth. Because the verdict of the jury is contrary to the law and evidence.

Seventh. Because the court erred in admitting in said case the testimony of Chas. Snell a witness for the Government, of the purpose to use whom notice was not given by the Government forty-eight hours before the trial or at any other time.

Eighth. Because the court erred in not allowing defendants to show that they were surprised at the testimony of John Johnson, a witness for defendant, and to show previous declarations of said John Johnson through an interpreter on several occasions to defendant's counsel during the preparation of the case, contrary to his testimony on the stand, which declarations were favorable to defendants.

BARNES & REED,
Attys. for Deft.

And after argument by counsel said motion was by the court
498 overruled and the defendant Hickory at the time by his counsel excepted.

The court at the time of passing on the motion for a new trial, said:

499 *Ruling of the court on motion for a new trial. Delivered September 15th, 1892—9:30 a. m.*

PARKER, J.:

Thomas Shade having been acquitted by the jury, there is no longer a case against him, but against Sam Hickory alone.

The first cause set out in the motion for a new trial is:

"Because the court erred in its charge to the jury in saying to them in reference to the declaration of persons who did not believe in convicting

upon circumstantial evidence that they were the declarations of either fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstant al evidence is or to perform the ordinary duties of citizenship; and in further saying to them, 'As a matter of fact, the great conclusions of life upon which you act, and in which you believe, which control your destiny, which fix your code of morals, and which govern you in life, and fix your faith in eternity, are conclusions that you find only upon circumstantial evidence. You can find them in no other way. You see it is little understood, the proving power of this kind of evidence, its power and the frequency with which it is used in coming to conclusions by sensible men.'"

Now, it is not directly affirmed that these declarations are not true. There is no allegation of that kind in the motion for a new trial. There was nothing said in the argument but what they as true as Holy
500 Writ. I believe they are, and I believe that any one who has had any experience in the trial of cases, or in exercising the ordinary judgment of mankind upon the affairs of life, must be of the same opinion. If it is true, it can work no injury to the cause of justice to assert the truth. There is nothing in this charge in connection with these declarations or any other that takes away from circumstantial evidence any of its proving power, or that intimates to the jury that any of its proving power ought to be taken away; nor is there anything in the whole of this charge which gives to the proving power of circumstantial evidence more force than the law recognizes it has. Then, in the face of the fact that in every case tried in a court of justice where a person is charged with murder there are at least two elements that can be established alone by circumstantial evidence, and by no other kind of evidence; the fact that the act of killing was done willfully, and done with malice aforethought, I say in the face of that fact, in the face of the fact that this great system of law unless enforced is a mockery, a sham, a delusion, and a snare, and that you can not enforce it in any case unless you resort to this kind of evidence, the assertion of the court as to the characteristic of the persons who dispute the right to convict upon this kind of evidence are even more than true. And, if they are true, I say there is no injury that can be wrought to the cause of justice by asserting them. It may have the effect of giving this kind of evidence its due position in the establishment of truth. It may even have the effect of preventing the guilty from escaping merited punishment; but this is not against the cause of right and justice, but in
501 the interest thereof. What was said by the court in its charge to the jury could have no other effect than to give this kind of evidence its proper place with its proper proving power before the jury. In my judgment, this is absolutely necessary when we consider the misconception that exists even in the minds of reasonably intelligent men as to what this kind of evidence is and what weight it is entitled to. Everyone knows that the theme that a case is one depending upon circumstantial evidence in the hands of attorneys in this age is "a harp of a thousand strings" and every string is usually played on for all it is worth. It was said by Judge Dillon in his comments made in a case reported in 20 Iowa, 90, the fact that mistakes are sometimes made in drawing deductions from circumstantial evidence "is constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction upon merely circumstantial

evidence. But the law exacts a conviction whenever there is legal evidence to show the person's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence." It may be remarked that no case can be found, except where the court in the interest of criminals was not manacled by some restrictive statute, prohibiting any allusion to the evidence or its characteristics, and where the case depended upon circumstantial evidence, that the judge has said any less as to the character and importance of this kind of evidence as a medium of proof. It may have been said more elegantly and less abruptly, but certainly not any more truthfully. We do not observe elegance in murder trials quite as much as we do the truth. At least we seek not to sacrifice the truth to secure elegance of
502 diction. We are seeking to have its full force understood by the jury. I fully and entirely stand by the assertions made in the charge that are objected to in this cause for a new trial. They are true, and so clearly true that everyone knows them to be true. They in this case above all others were relevantly true. I can therefore see no wrong in having used them.

The second cause as set out for a new trial is:

"Because the court erred in that part of his charge in which, referring to the duty of the defendant who invokes the law of self-defense (in this case Sam Downing), and the conditions under which he may lawfully kill his assailant, when he says in substance that he must be especially cautious, because he is put in the position of the judge setting on the bench."

Now, there is a mistaken deduction from what the court said on that subject alluded to, in this, "that he must be especially cautious, because he is put in the position of the judge on the bench," etc. There is no language of that kind in the charge. There is nothing in it from which a reasonable inference of that kind can be drawn, in my judgment. We might read from different parts of the charge, if it were not for taking up time, but it may be said that the part of it which treats upon that subject is open p. page 31:

"You see a man is required to discharge certain great duties under all circumstances, and especially is this law of duty incumbent upon him when he is put in that position, in the position of a judge sitting on the bench, deliberating upon what the law is, and of a jury sitting in the jury box listening to the facts, and finding coolly, deliberately, and dispassionately as possible under the circumstances what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that, but he is the executioner. He finds what the acts are as a jury, and he makes an application of the law that he finds as a judge to these facts that he finds as a jury, he enters up a judgment, and he then and there as a marshal kills in furtherance of the judgment."

That is what the court said substantially upon that subject. There is one other allusion incidentally to the same subject, but it is
503 in about the same language. This language ought to have been set out in the exact words used by the court, and not say in the motion for a new trial that substantially that is the case, because it is liable to mislead.

The third cause for a new trial as set out in the motion is:

"Because the court erred in his charge to the jury in commenting upon the facts in the case in such a way as to give undue prominence to the in-

culpatory and not sufficient prominence to the exculpatory facts, and in assuming that a portion of the witnesses for the defense were brought to the court to hound and break down a part of the Government witnesses by false testimony."

I do not care anything especially about spending any time upon that c'ause, except the last part of it, but it may be remarked that there is no comment upon the facts in this charge as that expression is understood in the law, nor is it the practice of this court to comment upon the facts in the sense of what is regarded by the law as a comment. A comment on the facts means that the court tells the jury what certain facts prove, what they establish, gives its opinion as to their proving power. They are only told in this charge that they may take into consideration certain relevant facts as proving facts, but what each fact proves is nowhere asserted, nor is it ever asserted by this court. No Federal court is freer from that practice than this court. No right of the jury to weigh disputed facts is impinged on by the court in this case. But if the court had in this case given its opinion on matters of facts, which is commenting on them, as the word is understood, which it has a right under the Federal practice to do, there could be no legal objection taken to its so doing, and that principle is abundantly established by every decision where the question has ever been presented to the Supreme Court of the United States. In
504 the case of Insurance Company v. Trefz, 104 U. S., 197, the court said:

"It is not error for the judge, in his instructions, to comment upon the evidence, if he does not take from the jury the right to weigh the evidence and determine the disputed facts."

In the case of Continental Improvement Company v. Stead, 95 U. S., 161, the court said:

"It belongs to the judge to exercise discretion as to the style and form in which he expounds the law and comments upon the facts. His duty is discharged if his instructions to the jury correctly state, although not in the ip'issima verba of counsel, the whole law applicable to the case."

But the whole doctrine upon this subject is fully reviewed in a note to the case of Games et el. v. Stiles et al., where the principle in the case of Transportation Line v. Hope, 95 U. S., 297, is asserted that the principle is well established that courts may give their opinion of the evidence to the jury, tell the jury what the evidence is worth as proving facts, and tell them how they are to regard it. That is the way that Federal judges usually do. I have never been in a Federal court where the judge did not take up the evidence in detail and give his opinion upon it, "being careful to distinguish between matters of law and matters of opinion, in regard to the fact. When a matter of law is given by the court to the jury, it should be considered by the jury as conclusive; but a mere matter of opinion as to the facts will only have such influence on the jury as they may think it entitled to." The note I refer to is as follows:

"In most of the States the usages of the English courts of justice have been adopted, where the judge always sums up the evidence, and points out the conclusions which, in his opinion, ought to be drawn from it."

Now, if this court ever did that in any case, among the hundreds
505 that have been tried here, I do not know it, and yet it is criticised outside, upon the principle that when a man looses his case he is

to damn the judge because the jury has gone home, and the judge remains to be pointed out and damned up and down.

"Submitting them, however, to the consideration and judgment of the court, and in such states, it is not improper for the circuit court to follow the same practice. (Mitchell v. Harmony, 13 How., 131.) The judge may express his opinion on the weight of evidence, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so. (Insurance Co. v. Rodel, 95 U. S., 238.) Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence, and the instruction given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in nowise intended to fetter the exercise finally of their own independent judgment. Within these limitations it is the right and duty of the court to aid them, by recalling the testimony to their recollection, by collating its details, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends, in every case, upon the discretion of the judge. There is no more important duty resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well, without this aid; in such cases chance, mistake, or caprice, may determine the result."

Referring to Nudd v. Burrows (91 U. S., 439) and a number of other authorities that are given here, there is nothing to show in this charge to the jury in this case that the court went as far as it might have done under the law as I have read it, and it never does. The court in all these charges simply defines the different kinds of evidence, and tells the jury how they may find certain things. It tells them that certain propositions are established by certain kinds of evidence. It does not say to the jury that this fact has a tendency to establish a certain proposition, or does establish it. Now, a word or two upon the point made in the latter part of this cause for a new trial. It is hardly necessary to do so, because

I have already expressed my opinion upon the class of wit-
506 nesses who came here as cappers—that is what they were. I never saw a case where there were as many of them as there were in this case, and they were brought here without any purpose other than as shown by their own statements and the statements of the other witnesses, to trail these Government witnesses around to get them into a compromising position; to get them in a position where they could testify to something that they may have said, but when they would come upon the stand they would magnify or color it, or else they really misunderstood what was said. I do not charge anybody with this, but I want to say that at this term of court the power of this court has been invoked and the money of this Government has been largely spent in many cases to bring miserable wretches of that kind to hang around the vestibule of this court-house and upon the streets and other places, following up Government witnesses that they might get them to make declarations and then come in here and swear to something that they have said to break down the Government's testimony. It is a practice that the power of this court will be

exercised to break up, like many reprehensible practices that have grown up here. I propose to denounce it to every jury and in the presence of everybody who is interested in the case wherever it is manifest. It is the duty of this court to see that justice is administered here purely, and that perjury or subornation of perjury is not entitled to any consideration in the trial of these cases. And wherever witnesses put themselves in that position, wherever they are brought here without disclosing the purpose for which they are brough', or that they are not used for the pur-
507 pose for which they were brought, but they are turned into spies, detectives, and cappers, to follow other witnesses around, they may be expected to be denounced in the presence of the jury and everywhere else. That is all I have to say upon that cause. If that is objectionable, if that is not in the interest of justice, if that practice is to prevail in this court, if this court is to be directed to try cases over again because they are reversed by the appellate court upon such grounds, let it be so; but I want the world to understand what this thing means, and I want it to understand that these practices are practices that are resorted to.

The fourth cause, as set out in the motion for a new trial, is:

"Because the court erred in its charge generally by making the same prolix, abstract, argumentative, and misleading, and because said charge, though taken down by the court stenographer, was delivered orally by the court."

It is not asserted in this cause that the charge does not express the law, but it goes rather to the form of its asserting it, by saying that the same is prolix, abstract, argumentative, and misleading. Prolix means "extending to great length." When we consider that the charge of the court in reviewing all these great propositions that enter into these trials usually consumes from one-third to one-half of the time taken up by counsel on a side, it can not be considered that the charge goes to great length. Prolix means "extending to great length; minute in narrative or argument; long; indulging in protracted discourse; tedious; wearisome." I hardly know which one of these meanings is intended to be used; but in but in a case of murder, where a man is on trial for his life, it certainly is appropriate that the law as it is given should be extended as far
508 as necessary, even if it be of great length. That it should be minute can not be disputed. It is neither minute in narrative or argument, but only minute as to what the relevant vital principles of the law of the case are. The expression of the law by the court should be even long, if necessary, to give to the jury a correct understanding of the law; that to accomplish this the court should even indulge in protracted discourse, though what he says may seem even tedious and wearisome. Now, it is said that the charge is abstract. That means, of course, legally speaking, that it asserts principles that have no relevancy to the case. That is what abstract means. A concrete principle of the law is a principle that has been invoked, or, more strictly speaking, is a principle that is relevant to the case. This court does not take from the case that which ought to belong to it, I think, by saying to the jury that this principle asserted by counsel is not relevant, it is abstract; but whenever a principle is invoked in a case the court gives the law involved in that principle, leaving to the jury to determine whether the application is relevant or not. Abstract, as defined by Mr. Webster, means "Distinct from something else; separate; withdrawn

from the concrete or from particulars; separate; as an abstract subject; hence, difficult; abstruse; refined." There was not a principle of the law given to the jury in this case that was not invoked on one side or the other. Perhaps it would be better, and I sometimes think it would, for the court, when counsel make arguments upon principles that are not supported by any evidence, to tell the jury so, eliminate them from the case and the charge so it would not be so tedious and tiresome to listen to upon the part of counsel. I think that would be best sometimes, yet the
509 practice has grown up here of the court giving to the jury every principle that is invoked, whether that principle is an abstract principle or not, or whether it may turn out to be abstract. That is a question left to them for determination.

It is said, again, in this cause for a new trial, that the charge of the court was argumentative. It does not state whether of the law or the facts. If it means argumentative of the law then it is not objectionable, as this word means "containing a process of reasoning." You can not state a legal proposition without it containing a process of reasoning, showing the reasons for the adoption of things to their uses. That is argumentative of the law. If there is anything that is argumentative of the facts they ought to be pointed out in the motion for a new trial. As this word means "containing a process of reasoning, showing reasons for the adoption of things to their uses," there certainly can be no objection on this ground, for certainly no charge can be delivered that does not contain a process of reasoning, or that does not show reasons for the principles of the law invoked, or that does not endeavor to adopt these principles to their uses in the case. Again, it is said that the charge was misleading. This means either "to lead into a wrong way or path," or "lead astray," or "to guide into error," "to cause to mistake," "to deceive." Now, it may not be inappropriate to allude to this charge, which was substantially the same as all other charges upon like subjects when the same principles are invoked, and the best evidence of the truth of a proposition, if we can get at the effect of it, is to take the effect of it, to see what is actu-
510 ally produced by it. In the 17 years I have been holding court here there have been 2,200 jurymen who have performed service in this court, outside of those who were called in as extra jurors, and among all the thousands of cases that have been tried the assertion may be truthfully made that there has not been 100 cases where the juries have come back into court to ask to be recharged upon the law of the case. Then to say that these propositions, as expressed by the court in this way, are misleading to the minds of the jury, is not sustained by the effects produced. If it is meant from a standpoint of guilt that the jury are led in a given case to find guilt, that that is misleading, I suppose, of course, that might be truthfully asserted in many cases, but as far as the charges of the court, or this charge, being put in a shape where the jury are unable, or have been unable, to understand the law, judging from the effects, I think that the assertion is not correct.

In the face of the terrible inculpatory facts in this case, showing, in my judgment beyond question, that a wicked, unprovoked, savage, and brutal killing was the act of the defendant, it would be hard for any reasonable man to seriously assert, when reading the charge to the jury in this case, that the jury were misled by that charge in the wrong way, or in the path

that was not illuminated by the light of the testimony in it; or that they were misguided, or that they were led away from the evidence, or that they were so influenced by the terms or the language of this charge as that they came to a conclusion not supported entirely and fully by the facts in the case. It can not be asserted, therefore, that they were caused by
511 the charge to make a mistake, or that they were deceived into a false verdict by it, because the evidence is abundant, so abundant that in my judgment no honest and intelligent juror could come to any other conclusion but that of guilt, and guilt, too, of a crime that brings the blush of shame to any man living in this age because of the brutality and cruelty and bloody character of it. This verdict, then, in the judgment of all dispassionate men, in the light of the evidence, is the best evidence that none of the above conditions were produced by the charge of the court so as to produce a false result. The other objection under this cause is that the charge was delivered orally and taken down by the court stenographer. Well, that is a thing the court has a right to do—to deliver the charge orally. It is not asserted it was wrongfully taken down; it is not asserted that the propositions of law as asserted by the court were not taken down substantially as they were delivered. There may be typographical errors, there may be the omission of a word here and there, but it is noted that the stenographer of this court generally gets down correctly what is said. There is nothing in that objection. This method of charging the jury, as I have said, can be rightfully followed, and in order that there may be any objection made it must be asserted that the charge was not correctly reported.

The fifth cause for a new trial, as set out in the motion, is:

"Because the court misinstructed the jury as to the law of the case."

I pass this by because no specific part of the charge is pointed out by which the court misinstructed the jury.

The sixth cause for a new trial, as set out in the motion, is:

"Because the verdict of the jury is contrary to the law and evidence."

512 I will remark on this cause that what I have already said applies to this. I believe that the verdict is fully sustained by the law and by the evidence, and I am not able to see how the jury could come to any other conclusion in the light of this evidence.

There is another objection supplemented here by counsel, and it is:

"Because the court erred in admitting the testimony of Chas. Snell, a witness for the Government——"

I can not read this, but the objection is that he was called as a witness for the Government when no notice had been given the defendant by the Government that he would be used as such witness. The two days' notice required by the law was not given. Now, the facts are that this witness was sworn and examined in chief before he was objected to. Then Mr. Thos. H. Barnes, of counsel for defendant, arose and objected to his evidence being received in the case before he asked any question on cross-examination.

Mr. BARNES (of counsel for defense). My recollection is that the district attorney had not quite completed the examination in chief of the witness. However, I do not suppose that makes any difference.

The COURT. I think he had. I think the record shows that, but that would not make any material difference. The doctrine of the case of Logan v. United States, as set out in 144 U. S., 263, and the authorities there cited, make the objection to Mr. Snell as a witness one that was not seasonably taken. The court recognizes the principle that
513 this right of objection in such a case is a right that unquestionably belongs to the defendant, and he has a right to insist upon it, and if he seasonably objects to it the trial can not lawfully proceed until the law has been complied with. United States v. Stewart, 2 Dall., 343; United States v. Curtis, 4 Mason, 232; United States v. Dow, Taney, 34; Regina v. Frost, 9 Car. & P., 129; S. C., 2 Moody, 140; Lord v. State, 18 N. H., 173; People v. Hall, 48 Michigan, 482, 487; Keener v. State, 18 Georgia, 194, 218. This statute of the United States requiring notice to be given is a statute drawn from "the English statute of 7 Anne, c. 21, par. 11, by which it was enacted that, 'When any person is indicted for high treason or misprision *or* treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors be also given, at the same time that the copy of the indictment is delivered to the party indicted, and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial and in presence of two or more credible witnesses.' Upon a case brought before all the judges of England, in 1840, in which a copy *if* the indictment and list of the jurors had been delivered to the defendant fifteen days, and a list of the witnesses on the trial had been delivered to him ten days before the trial, the defendant, after he had been put upon his trial, and the jury had been sworn and charged with him upon the indictment, objected, upon the first witness being called and before he was sworn, that neither that witness nor any other could be examined, because the list of witnesses had not been delivered to him at the same time as the indictment and the list of jurors, as the statute of Anne required. It was argued for the crown that the list of witnesses was seasonably delivered, and that, if not, the objection should have been taken earlier. It was held, by a majority of the judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to its delivery was not taken in due time; and the judges agreed that, if the objection had been made in due time, the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list. In the course of the argument Chief Justice Tindal said: 'If no list had been delivered the crown could not have called a single witness.' Regina v. Frost, 9 Car. & P., 129, 175, 187; S. C., 2 Moody, 140, 158, 170."

There is great reason for that construction of the law. Here is a
514 case that costs the Government thousands of dollars, and the Government through some oversight has neglected to serve notice upon the defendant that such and such witnesses will be u-ed, and if the defendant reserves his objection until the witness is offered upon the stand may cause the Government to be caught in a trap without any intention of neglect. It would be a reasonable construction of this law that the party before the jury is empannelled should object then. He should be required to object at that time. Perhaps the language of the law would not war-

rant that broad a construction of it, but certainly the objection should be made, by the light of this English case and another one I am going to read, before the witness is examined. Here is an American case upon this subject, the case of Lord v. State, 18 N. H., 173, 175, 176, it being referred to in the case of Logan vs. U. S. in connection with this English case I have just read:

"The supreme court of New Hampshire, in 1846, under a statute providing that 'every person indicted for any offense, the punishment of which may be death or confinement to hard labor for life, shall be entitled to a copy of the indictment before he is arraigned thereon; a list of the witnesses to be used on the trial, and of the jurors returned to serve on the same, with the name and place of abode of each, to be delivered to him forty-eight hours before the trial,' held that an objection to the list of witnesses, for want of due statement of their places of abode, was waived if not taken until after one witness had been called and sworn at the trial."

In that case only one witness had been called and sworn at the trial when the objection was made, undoubtedly, if we had all the facts of the case, to all of the other witnesses, and that supreme court held it was too late. In the English case they held it was too late if the jury was empannelled and sworn. They do not decide that question expressly in this case, because they say it is not necessary, but they refer with ap-
515 probation to these decisions, and heartily recognize the principles contained in these decisions by their approval of them.

Mr. BARNES (of counsel for defense). In each of these cases the objection was made to the whole list of witnesses?

The COURT. That can not make it any stronger in my judgment or any less strong. Parties are presumed to know when their cases are ready, and they must make this objection at least before the witness proceeds to testify. In the case of the other witness in this case the court recognized that the objection was well taken when the witness was presented and the objection was sustained, and the witness not allowed to testify.

The eighth cause for a new trial as supplemented to the motion by counsel, is:

"Because the court erred in not allowing defendant to show they were surprised by the testimony of one Johnson, a witness for defendants, and to show previous declarations of said Johnson to defendant's counsel through an interpreter on several occasions during the preparation of the case, contrary to his testimony on the stand, which declarations were favorable to defendants."

I do not believe the court committed any error in not permitting the defendant to impeach the witness, Johnson, because he was called at the instance of the defendant and sworn by him, and gave his evidence, and was the defendant's witness in my judgment, and he was not in a position to impeach him.

The motion for a new trial will be overruled.

Mr. BARNES (of counsel for defense). I do not know whether it is customary to save exceptions——

The COURT. They are considered as saved. I do not think it is necessary.

516 Whereupon the court pronounced the sentence of death upon the said defendant. To which judgment and sentence of the court the

defendant at the time excepted and was given until the day of October, 1892, to prepare and file a bill of exceptions, which the defendant here tenders and prays that the same may be signed and made a part of the record in this cause, which is accordingly done.

Oct. 15, 1892.

I. C. PARKER,
U. S. District Judge presiding in the Circuit Court at the time it tried the above-entitled cause.

517 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas. August term, 1892.

THE UNITED STATES, PLAINTIFF,
vs.
SAM HICKORY, DEFENDANT. } Murder.

The defendant in the above-entitled cause, Sam Downing, files this his assignment of errors, committed on the trial of said cause, to wit:

1. It was error in the court to not allow defendant to put in evidence the handwriting of defendant Sam Hickory made in the presence of the jury for the purpose of comparison with and disproving his alleged handwriting in a certain letter marked " " put in evidence by the Government and claimed to have been written to his alleged wife.

2. It was error for the court to admit in said case the testimony of Charles Snell, a witness for the Government, for the purpose to use whom no notice given by the Government forty-eight hours before the commencement of the trial or at any other time.

3. It was error for the court not to allow defendants to show that they were surprised by the testimony of John Johnson, a witness for defendants, and to show previous declarations of said John Johnson to defendants' counsel through an interpreter on several occasions during the preparation of said case contrary to his testimony on the stand, which declarations were favorable to defendants.

518 It was error for the court in its charge to the jury to say to them in reference to the declarations of persons who did not believe in convicting upon circumstantial testimony that they were the declarations either of fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is or to perform the ordinary duties of citizenship, and in saying to them, "As a matter of fact, the great conclusions of life upon which you act and in which you believe, which control your destiny, which fixes your code of morals, and which governs you in life and fixes your faith in eternity, are conclusions which you find only upon circumstantial evidence. You can find them in no other way. You see it is little understood, the proving power of this kind of evidence; its power and the frequency with which it is used in coming to reasonable conclusions by sensible men."

5. It was error for the court in that part of its charge in which he refers to the duty of the defendant, who invokes the law of self-defense (in this case Sam Downing) and the conditions under which he may lawfully kill his assailant, to say in substance that he (def't) must be especially cau-

tious, because he is put in the position of the judge sitting on the bench, deliberating upon what the law is, and of a jury sitting in the box listening to the facts and finding coolly, deliberately, and dispassionately what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that, but he is the executioner. He finds what the facts are as a jury and he makes an application of the law that he finds as a judge to these facts that he gives as a a jury. He enters up a judgment, and he then and there as a
519 marshal kills in furtherance of the judgment." And the court further erred in the subsequent part of said charge on the same subject in enumerating and illustrating the powers concentrated in the said defendant and the manner in which he could rightfully exercise them.

6. It was error for the court in his charge to the jury to comment upon the facts in the case in such a way as to give undue prominence to the inculpatory and not sufficient prominence to the exculpatory facts, and to assume that a portion of the witnesses for the defense were brought to the court to hound and break down a part of the Government witnesses by false testimony.

7. The court erred in its charge generally by making the same prolix, abstract, argumentative, and misleading and by delivering the same orally to the jury, and by misinstructing the jury as to the law of the case.

All of which grounds of objection to the charge of the court will more fully appear by an examination of the whole charge presented in the bill of exceptions.

8. It was error for the court to overrule the motion for a new trial and to sentence the said defendant.

Wherefore the above-stated errors considered, the said defendant prays that the judgment and sentence against him be reversed.

SAM HICKORY,
By BARNES & REED,
His Attorneys.

520 In the circuit court of the United States for the western district of Arkansas. August term, A. D. 1892.

THE UNITED STATES, PLAINTIFF,
vs.
SAM HICKORY, DEFENDANT. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

You petitioner respectfully represents that at the August term, A. D. 1892, of this court he was convicted on the indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing the said cause and the record therein to the said Supreme

Court in order that the same may be there reëxamined, and if error be found that the judgment and sentence against him therein may be reversed.

SAM DOWNING,
By BARNES & REED,
His attorneys.

521 In the circuit court of the United States for the western district of Arkansas.

SAM HICKORY, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

I do solemnly swear that I am the identical Sam Hickory tried and convicted at the August term, A. D. 1892, of the circuit court of the United States for the western district of Arkansas, of the alleged crime of murder; that I am now under sentence of death in said court.

That I am prosecuting a writ of error under sec. 6, chapter 113 of "An act to abolish circuit-court powers of certain district courts of the United States and to provide for writs of error in capital cases, and for other purposes."

That I am poor and utterly unable to pay the costs of prosecuting said writ of error, not being possessed of property of the value of twenty dollars or of any value whatever.

So help me God.

SAM HICKORY.

Subscribed and sworn to before me by Sam Hickory, this 15th day of October, 1892.

STEPHEN WHEELER, *Clerk.*
By W. B. PAPE, *D. C.*

I hereby certify that the facts set out in the above affidavit are true.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

522 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States and Sam Hickory, a manifest error hath happened, to the great damage of the said Sam Hickory, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19 day of Oct., in the year of our Lord one thousand eight hundred and ninety-two.

STPEHEN WHEELER,
Clerk of the Supreme Court of the United States.

Allowed by .

Justice of the Supreme Court of the United States.

523 UNITED STATES OF AMERICA, *ss:*

To William H. H. Clayton, esq., United States attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Sam Hickory is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac C. Parker, judge of the district court of the United States, this 19 day of October, in the year of our Lord one thousand eight hundred and ninety-two.

ISAAC C. PARKER,
U. S. Dis. Judge, holding Circuit Court.

523½ On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 189 .

I, William H. H. Clayton, United States attorney for the western district of Arkansas, do hereby accept service of the within citation.

WM. H. H. CLAYTON,
U. S. Att'y.

524 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the records of this court in the case of the United States vs. Sam Hickory, indicted and convicted of murder at the Aug. term, 1892.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Fort Smith, in said district, this 20th day of October, A. D. 1892.

[SEAL.] STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15180. W. Arkansas C. C. U. S. Term, No., 841. Sam Hickory, plaintiff in error, vs. The United States. Filed October 25, 1892.

FILED
NOV 21 1898
JAMES H. McKENNEY,
CLERK.

No. 841.

IN THE

Supreme Court of the United States.

SAM HICKORY, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 841.

SAM HICKORY, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

Sam Hickory, the plaintiff in error, was at the August term, 1892, of the United States Circuit Court for the Western District of Arkansas, jointly indicted with Thomas Shade for the

murder of Joseph Wilson. The first count of the indictment charged the killing with a gun. The second count with an axe. —*Record, pp.* 1.

At the said August term, 1892, the plaintiff in error, and Thomas Shade were put upon trial. Shade was acquitted and the plaintiff in error, was convicted of murder upon the first count of the indictment.—*Record, pp.* 6.

The evidence upon the part of the government against the plaintiff in error, was substantialiy, as follows:

Sam Hickory, sometimes called Sam Downing, a Cherokee Indian, lived ten miles from Tahlequah, Cherokee Nation, with Aleck Stock, generally known as Big Aleck. On the 22nd day of September, 1891, Joseph Wilson, a United States Deputy Marshal, went to his place of residence to arrest Hickory upon a Commissioner's writ, charging him with the introduction and sale of spiritous liquors in the Indian Country. He procured John Carey, a Cherokee, who lived four miles from Aleck's, to show him where Hickory lived, and Carey went within a quarter of a mile of Aleck's house, and on account of Carey's not wanting it known that he had any connection with the arrest, it was arranged that he should remain there in the woods while Wilson went to the house and arrested Sam. While there consulting, they saw Big Aleck pass some distance off on another road leaving home on foot. Wilson told Carey that if he found Sam after he arrested him he would fire his pistol off to notify him that he had made the arrest, so that he could meet him at a designated point.—*Record, pp.* 41.

Wilson then left and Carey remained in the woods waiting for the signal. He further testified that, "In about half an hour, may be not quite so long, I heard a gun fire, kind of a pistol or something. It fired and you could have made two or three steps before there was two right together, nearly together, fired. I was riding along then and they kept shooting for a little time."

Q. (By District Attorney). Then the other guns were fired off slow? How many other guns were fired?

A. I could not say exactly how many, but then there must have been about five or six shot.

Q. After the first three?

A. They were all of them I expect about that. I could not say how many exactly, but the last shot that was fired was what I thought was a rifle gun. It went off keen. I didn't know the direction, whether it was close to the house or some other way. I thought at the same time that Joe had met some body there and was going on, and I rode on around to where he said he would meet me, and I came there and waited until sundown and he never came. He further testified, that the sun was up high. That he waited at this place an hour and a half. Then at Mrs. Brown's near by until sundown. Then went to Squirrel Carey's and told him about hearing the shooting, and that Wilson was to fire off his pistol, but that he didn't say how many times. This was Tuesday afternoon.—*Record. pp.* 42.

Witness and several others rode to Big Aleck's house that night. It was dark. They did not dismount, see or hear any

one. Asked in Cherokee if they were asleep. No answer. Saw a small fire in a little house near the new house, where it was afterwards learned that the shooting occurred.

On Wednesday night, after hearing a rumor that there was a man lying up at Aleck's; wounded, witness and Neal Nugent went up there again. They found Big Aleck and another old man, Jim, who lived there in the little house. Did not see defendant or his wife there. The big house was dark. Witness told Big Aleck he heard there was a man there wounded and he came to see him and attend to him. He replied that he did not know anything about it and there had been nothing done on his place that he knew of.—*Record, pp.* 45.

Thursday morning witness gathered a considerable party of men and returned there. He says (*Record, page* 45) after they rode up Big Aleck came out and sat on seat by door of big house and said, "you all come to see about this house where the shooting was?" They dismounted and he took them all around saying: "Here is one place," and "here is another." They found blood all around there in and outside of house. Blood on outside part of front door, "lots of blood in back room," specks of blood from middle door through a side door of said room to near the smoke house where there was a large pool of blood eight feet from smoke house and twenty feet from large house.—*Record, page* 46.

In refference to the shots the examination (*pages* 46 *and* 47) and cross-examination (*pages* 53, 54 *and* 55) show that certainly one and probably two shots were fired from

a South-easterly direction, where the marshal likely was at the commencement of the shooting, towards the front door, one striking a corner post and the other the wall near the door. Two shots had been fired from the inside of the house through the front door, as shown by the holes. One shot had been fired from the large room glancing the middle door shutter which was open, and going into the wall of the rear room, and another had gone into the wall of the rear room opposite the center of the middle door.

It was also shown that the body of Wilson, with all his clothing, papers and watch, was found on Friday after the shooting on Tuesday, in the head of a gulch, fifteen feet below the top of a ridge, one and a half miles from Big Aleck's house. Wagon tracks indicated that it was hauled in Aleck's wagon from where it had stood near the pool of blood referred to, to the gulch where it was found.

Charles Snell, (exception to the introduction of whose testimony will be hereafter referred to), identified the remains found, as Wilson's. (*Record, pages* 21-22). Claimed that the skull was cracked on top and had been crushed in at the base. Also that there was one gun shot wound on the body, the ball entering about two inches below the right nipple and ranging straight through the body. (*Record, pages* 32-33). Also that Wilson's horse was found about one-fourth of a mile from Big Aleck's house, in an opposite direction from the body, with his throat cut and dead. There was also introduced over the objection and exception of defendants, a letter written in the Cherokee

alphabet and claimed to be in defendant Hickory's handwriting, to Ollie Hickory *alias* Williams, interpreted as follows:

October 15, 1891.

OLLIE:

I write you a few lines. You must never disclose how this is about Tom Shade. Just say that I was the only one who did it. You must never tell any one that h[illegible] all that he done. I tell you that you must not. That is all now. I write in haste. SAM.

This was in Cherokee characters resembling English printed capital letters.

Price Cochran testified that this letter was given him by Mrs. Catcher, mother of Ollie. That he knew Hickory's handwriting, but on cross-examination could not fix any time or place where he had ever seen him write. Said that "it was any where in the Cherokee Nation." That the only difference in Cherokee hand-writes, was that "some were good and some were bad." *Record, pp.*

There was also an attempt to show that Wilson, after being badly wounded by Hickory, was finally killed with an axe by Thomas Shade the following day or later.

DEFENDANT'S TESTIMONY.

The testimony on the part of the defense showed that there were only four persons residing at the place of the killing. Aleck Stock, seventy-six years of age, old man Jim, Ollie and

defendant, then only nineteen years of age. That only Ollie and Sam were there when the Marshal arrived. That Sam was hitching up a team of horses intending to haul posts and was from twenty to thirty feet E. Southeast of the corner of the porch. That it was about four o'clock in the afternoon when the Marshal rode up to where he was, and asked which road leads to Lewis Hawkins'. He pointed out the road, then the Marshal asked: "Is there any drinking water here?" Defendant answered, "Yes." The Marshal then dismounted and said: "I believe I know you. Your name is Sam Downing, isn't it?" He answered "Yes." The Marshal said, "Then I put you under arrest for introducing whisky." Defendant said "All right." *Record, pp.* 200-201.

Defendant then unharnessed the horses and turned them loose. The Marshal said: "Ain't you going to ride one of them." He replied, "No, they don't belong to me." The Marshal said: "Where is the owner of them?" He told him that the owner had gone. The Marshal then told him to ride one of them to the house where owner was, and if he would not let him ride it he could bring it back. Defendant told him all right, and then put the bridle on the horse. Then Wilson told him to hurry up and get the saddle, that it was getting very late and they must hurry and go. Defendant said all right and started to the house for the saddle. When he was about three steps from the porch he heard a gun fire. He turned around that way and saw Wilson with a revolver and saw the smoke coming out of it. Then he kept going toward the house. The

second shot was fired when he was just about to the door. He ran into the house and shut the door, and was going to go out through the side room door and run off. He had gotten about as far as the middle door of the side room when he discovered the Marshal was coming in through the outside door of the side room with his pistol raised this way at him, (indicating).

He then ran back, got his gun and went to the front door. The marshal then again appeared at the middle door and fired upon him. He returned the fire, and they shot again about the same time. There was another exchange of shots. The marshal disappeared from the middle door, went to where he had dismounted from his horse, and laid down, close to wagon.

Defendant testified that all he heard the Marshal say during the fight was to the woman Ollie, to get away. This was as he entered side room door. That he then ran to the east side of the front room in which he was, got his gun and went to front door. The Marshal then appeared at middle door, sheltered partly behind facing, and exposed his breast just enough to shoot at defendant, which he did, and defendant returned the fire and they again exchanged shots. Defendant further testified that he ran off, came back in half an hour, the Marshal was lying there still, not breathing. He thought he was dead, was excited and scared and did not know what to do, nor just all he did do, and he put him on a wagon and hauled him off. The wagon did not have a bed on it, the road was rough and rocky, and the body fell off once. That he did not go into the man's pockets. If he had wanted to do that he would have taken his

watch. That he hid his saddle and coat in the woods. Did not see any one until he saw Ollie again at night. They stayed together in the apple orchard near the house all night. Jim came back about midnight and Big Aleck next day, and he, defendant, stayed around several days, until he moved on the advice of friends. That he did not see Tom Shade during said time. That "he could not account for the Marshal shooting, as he did nothing to induce him to shoot, and the Marshal had said nothing to him to lead to any thing of the kind." He also denied any statements in the nature of confessions to any one. (*Record, pages* 202, 203, 204, 205, 206). Defendant also stated that he did not write the letter to Ollie produced by Price Cochran. (*Record, page* 140). The defendant who spoke English very imperfectly was examined through an interpreter.

Ollie Williams testified through an interpreter, that she had been living with defendant at Big Aleck's about five months, at the time of the shooting. That the Marshal rode up to where Sam was harnessing horses to a wagon near a tree a little east of house and arrested him. That Sam unharnessed the horses and started in the house to get a saddle, and the marshal who was right by the tree shot at him. That she did not see how he held his pistol the first time he shot. Sam was a little out from the house then. When he shot the second time the smoke went toward Sam, who was then going in at the door. That she was near the front door when first shot fired and had started to go to middle door when she saw second shot fired. Went into side room and was going to go away, and the Marshal came around

to outside side room door and met her and said to her: "Get out of the way, go away." He had a pistol in his hand. She went to the spring, over a quarter of a mile. Heard more shooting while going. Could not tell how much. Remained at spring until after dark and returned to house and saw no one there, but afterwards saw Sam and they stayed together in apple orchard that night. Had no connection with moving deceased's remains. (*Record, pages* 148, 149, 150, 151). That Tom Shade was not there until Thursday. Stayed a little while, inquired for Sam and rode away. (*Record, page* 153). States that she never received a letter from Sam after the shooting. Is shown the letter in evidence, says she never received it.—*Record, pp.* 154, 155, 160.

Aleck Stock testified, that he went to the Widow Brown's, who was sick, Wednesday afternoon, to give her Indian medicine. Heard no shooting. When he came home Wednesday saw no dead or crippled man about his place. That no team was hitched up there that day or the next. That he was arrested and chained to Tom Shade for one night. Hickory did not send him for Tom Shade, and Shade made no confession to Tom Galcatcher while chained to him, that he had struck deceased in the head with an axe. (*Record, pages* 165-166). Didn't know who hauled body away. Didn't see the body.—*Record, pp.* 166.

Jim Squirrel testified, that he had gone to a fish killing on Grand river Monday. Returned about midnight Tuesday. Sam was there at breakfast Wednesday morning. Did not learn

of killing until Monday night. Saw the horse south of the house Wednesday afternoon. He was wounded in the knee but alive. Knew nothing of disposition of remains of deceased.—*Record, pp.* 172, 173, 174.

C. L. Bowden testified, that he was a Deputy Marshal. Went to Aleck Stock's and examined the house, locates bullet holes and the direction fired as claimed by defendant.—*Record, pp.* 188.

W. G. Blake, physician, testified, that on September 26, "after Wilson's remains were taken to Tahlequah, by request of Commissioner Ridge Paschal, he examined the body. Found gunshot wound one and a half inches below right nipple and to the inner side, perhaps half an inch from sternum bone. Corresponding wound coming out under lower border shoulder blade two inches from center of back. There were two scalp wounds, one on top of head, other in back of head, but could not say that the skull was fractured. They had the appearance of being made by some blunt substance, striking the head or the head strikng the substance.—*Record, pp.* 196, 197."

Tom Keener testified, that he had seen defendant write many times. Had gotten letters from him and knew his writing. Was shown writing marked Exhibit "A" produced by witness Cochran, examined it and said: "Sam does not write like this." "Know Sam's way of writing and he shapes his letters different to this." That he had been educated in Cherokee and could explain the difference in characters used in handwriting. Was

shown a paper marked "X," which he pronounced Sam's handwriting, and pointed out the difference between the writing in that and paper marked "A."—*Record, pp.* 136, 137, 138.

G. W. Benge testified, that he lived at Tahlequah, capital of the Cherokee Nation. That he was Auditor of Public Accounts four years, then Solicitor, then Circuit Judge. Had much experience in handling Cherokee handwriting as Auditor, and when Solicitor handled both English and Cherokee prints of law constantly. He was then asked to compare writings marked Exhibits "A" and "X," which he did and said they were written by different persons. That there was as much difference in writing Cherokee characters as in writing English characters. That a solitary mark in the Cherokee alphabet represented a sound. Each character represented a sound distinct within itself. He then pointed out the difference in the two papers to the jury, and on cross-examination said there was no resemblance except in the signatures.---*Record, pp.* 142, 143, 144.

Joe Shade testified that the paper marked Exhibit "A," was not in the handwriting of defendant, and during his cross-examination produced a paper covering several pages written at his house for his little girl by Sam two years previous to the trial marked "X," that was admitted by defendant to be genuine and afterwards used by him for comparison with Exhibit "A."---*Record, page* 136.

Tom Shade testified, that on the 30th of September (eight days after the killing) when he heard that it was claimed he

was implicated in the killing, he went to Tahlequah, and, in company with his father, uncle and Attorney Boudinot, hunted up Deputy Marshal Rusk and surrendered to him. Claimed that during the week of the killing he and his wife left Tahlequah at five o'clock on Tuesday afternoon, went some distance to John Johnson's. Gave his whereabouts during the different days, and said he stayed at Johnson's, ten miles from Big Aleck's, Tuesday, Wednesday, Thursday and Friday nights. That he did not meet Hickory during the week, had no knowledge of, or connection with the killing, and had never so stated. —*Record, pages* 222, 223, 227.

Mack Quinton, Arch Downing and Phillip Bennett, all testified to the peaceable and law-abiding character of defendants. A number of witnesses were also introduced who impeached and contradicted Bryant Hughes, who testified to a statement of Hickory implicating Shade.

ASSIGNMENT OF ERRORS.

The defendant, Sam Hickory, sometimes called Sam Downing, filed the following Assignment of Errors:

1. It was error in the Court to not allow defendants to put in evidence the handwriting of Defendant Sam Hickory made in the presence of the jury for the purpose of comparison with and disproving his alleged handwriting in a certain letter marked "A," put in evidence by the Government and claimed to have been written to his alleged wife.

2. It was error for the Court to admit in said case, the testimony of Charles Snell, a witness for the Government, of the purpose to use whom, no notice was given by the Government forty-eight hours before the commencement of the trial, or at any other time.

3. It was error for the Court not to allow defendants to show that they were surprised by the testimony of John Johnson, a witness for defendants, and to show previous declarations of said John Johnson to defendants' counsel through an interpreter on several occasions during the preparation of said case, contrary to his testimony on the stand, which declarations were favorable to defendants.

4. It was error for the Court in its charge to the jury to say to them in reference to the declarations of persons who did not believe in convicting upon circumstantial testimony, that they were the declarations either of fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship, and in saying to them, "As a matter of fact, the great conclusions of life upon which you act and in which you believe, which control your destiny, which fixes your code of morals, and which governs you in life and fixes your faith in eternity, are conclusions which you find only upon circumstantial evidence. You can find them in no other way. You see it is little understood, the proving power of this kind of evidence; its power and the frequency with which it is used in coming to reasonable conclusions by sensible men."

5. It was error for the Court in that part of its charge in which he refers to the duty of the defendant, who invokes the law of self-defense, (in this case of Sam Downing) and the conditions under which he may lawfully kill his assailant, to say in substance that he (defendant) must be especially cautious, because he is put in the position of the judge sitting on the bench, deliberating upon what the law is, and of a jury sitting in the box listening to the facts and finding coolly, deliberately, and dispassionately what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that but he is the executioner. He finds what the facts are as a jury, and he makes an application of the law that he finds as a judge to these facts, that he finds as a jury. He enters up a judgment, and he then and there as a marshal kills in furtherance of the judgment." And the Court further erred in the subsequent part of said charge, on the same subject, in enumerating and illustrating the powers concentrated in the said defendant and the manner in which he could rightfully exercise them.

6. It was error for the Court in his charge to the jury to comment upon the facts in the case in such a way as to give undue prominence to the inculpatory and not sufficient prominence to the exculpatory facts, and to assume that a portion of the witnesses for the defense were brought to the Court to hound and break down a part of the Government witnesses by false testimony.

7. The Court erred in its charge generally by making the

same prolix, abstract, argumentative and misleading, and by delivering the same orally to the jury, and by misinstructing the jury as to the law in the case.

All of which grounds of objection to the charge of the Court, will more fully appear by an examination of the whole charge presented in the bill of exceptions.

8. It was error for the Court to overrule the motion for a new trial and to sentence the said defendant.

Wherefore the above stated errors considered, the said defendant prays that the judgment and sentence against him be reversed.—*Record, pp.* 293–294.

ARGUMENT.

In the first place the Court should not have overruled the objection of counsel nor have admitted the letter marked "A." It was not received from Ollie and was never in her hands, and the cross-examination of Price Cochran immediately preceding and following its introduction, shows there was no sufficient basis for admitting the paper. Subsequently a number of witnesses familiar with Hickory's handwriting, stated that it was not his, and G. W. Benge, an expert, whose testimony is set out herein, compared the seven lines of this paper with the four pages of Exhibit "X" admitted to be genuine and pronounced it a forgery. The Court in committing the error complained of, as we conceive, relied upon a line of authorities dealing only with the signatures of parties, not as in this case with an extended writing made in the presence of the jury and offered for comparison with exhibit "A."

Jurors, as a rule, are now intelligent, educated men, capable of making their own comparisons, and the trend of modern legislation and decisions is in favor of this class of testimony. But as to how far papers may be put in the case to enable the jury to compare handwriting, the American decisions are far from uniform.

Greenleaf on Evidence, Vol. 1, Sec. 581, and notes.

A writing made in the presence of the Court and jury by a party whose signature is in dispute, may be submitted to the jury for the purpose of comparison.

Chandler vs. Le Barron, 45 Maine, 534.

As to the second Assignment of Error. (*Record, pp. 7, 8, 293.* The Revised Statutes of the United States, Sec. 1033, provide that "When any person is indicted for a capital offense, a copy of the indictment, list of jurors and witnesses shall be delivered to him at least two entire days before the trial."

The only reason given by the Court for overruling the objection and motion to exclude the testimony of Charles Snell, was that it was not seasonably made. Why? The District Attorney had not passed the witness for cross-examination, though he asked no further questions after objection was made. He had the indictment and list of witnesses endorsed upon it before him, and it is fair to presume, knew Charles Snell's name and residence was not so endorsed.

The Court in overruling this ground for new trial, laid stress

upon the cost of the trial, and seemed to think if there was oversight and negligence in not serving the proper notice that defendant might reserve this objection and "catch the Government in a trap." The more acceptable, the better authenticated doctrine is, that the Government demands justice at whatever cost, not victims. The gallows trap should not be sprung in the teeth of a plain statute. It would be as reasonable where a witness was on the stand and it was discovered, and record produced, at the close of his examination in chief, showing his incompetency because of his conviction of an infamous crime, to rule that the objection and motion to exclude his testimony came too late, as to rule that Charles Snell was a competent witness in this case. There can be no difference in the line of reasoning or in law.

The examination in chief of this witness developed fully both his overzealousness for, and importance to the prosecution. He was the only one who testified positively to the horses throat being cut, to the skull of deceased being cracked on top and crushed in at base, and to other important facts. In a case where the Prosecuting Attorney endorsed on the information the names of certain witnesses, and when the case came on for trial and before the trial was entered upon or jury called he endorsed on the information the names of a number of other witnesses without permission of the Court, and when the Court permitted them to be sworn and examined over the objection of the defendants counsel, the Supreme Court of Michigan held that this was error and directed a new trial.

People vs. Moran, 48 *Mich.*, 639.

And at the same term, the Court in another case, in passing upon the action of a lower Court, said: "The Court allowed the names of several witnesses to be added to the information during the trial, under objection, without showing that they were not known earlier and in time to give the defendant notice in season to anticipate their presence before the trial. The statute is explicit that this shall be done before trial where witnesses are known. This is not a mere formality, and wherever it has been provided for by statute it has been treated as a substantial right. (*Reg. vs. Frost*, 9 *C. & P.*, 147, *Rex. vs. Good Gordon*, 2 *Doug.*, 591.") The Court then discusses the importance of the testimony of three of these witnesses, and in regard to one of them, says: "From a careful examination of the record we think it at least highly probable that the conviction was had upon this man's testimony. It is very evident that if the defendant had been able to hunt up the history of such a witness, the search would have been important."

People vs. Hall, 48 *Mich.* 487, 488.

This rule has been held to apply to all classes of witnesses, so that a defendant can be so advised as to guard against the production of persons unknown and whose character he should have an opportunity to canvass, so that he can impeach, contradict or meet their testimony in any proper manner. Finally, we invite attention to the following opinion delivered in construing Sec. 1033 of United States Revised Statutes:

"A delivery to the defendant after the trial begins of a list

containing the name of a witness who will be called in behalf of the prosecution, is not sufficient under this section to entitle the prosecution to use such witness on the trial, even though the Court should adjourn the trial for three days in order that the defendant may not be surprised.

United States vs. Neverson, 1 *Mackey*, 152.
United States vs. Williams, 1 *Cranch cc*, 178.

John Johnson, a Cherokee, who did not speak English, was called by the defendants as one of their witnesses to prove an alibi for Tom Shade. He resided about ten miles from the place of killing. It was really unquestioned that Shade was in Tahlequah at least eighteen miles from Big Aleck's at the time of the shooting Tuesday afternoon, and that he went from there to Johnson's with his wife, reaching there after dark, and up to that time could not have learned of the shooting. But the theory was maintained upon very shady testimony that he, in some mysterious and unaccountable way, found Hickory, after the shooting and before the death of Wilson, and crushed in Wilson's head with an axe.

Although Shade was acquitted, yet whatever tended to break down his alibi and establish a conspiracy and joint action with Hickory, tended to Hickory's conviction. Therefore, in this sense, Johnson was as much a witness called for Hickory as for Shade. Johnson was called by the defense to prove that Shade staid at his house on Tuesday, Wednesday, Thursday and Friday nights. But testified that he came there Tuesday night

after dark with his wife, ate supper, went away and did not return until Friday night, when he again went away with his wife. (*Record, pages* 103, 104). Being misled, injured and surprised by this testimony, defendants placed Isaac Shade, a witness for them, upon the stand and offered to prove by him that he acted as interpreter for said Johnson during the preparation of the case for trial by counsel for defendants, and during such time through said interpreter on two different occasions to Mr. Reed, of counsel, at the law office of Barnes & Reed, Johnson stated that Tom Shade, one of the denfendants, staid at his house on Tuesday, Wednesday, Thursday and Friday nights, of the week of said killing. The District Attorney objected and after argument the Court sustained the objection and exception was taken.—*Record, pp.* 234 to 239.

It has been held from time immemorial that, "if a witness state facts against the interest of the party calling him, another witness may be called by the same party to disprove those facts, for such facts are evidence in the cause and the other witne ssis not called directly to discredit the first, but the impeachment of his credit is incidental only and consequential.

2nd Phil. E. V., 448.
Rockwood v. Poundstone, 38 *Ill.*, 201.
Rindskoph, Stern, Lane & Co., v. Kuder et al., 145 *Ill.* 612, 613.

"A party cannot impeach his own witness in the sense of proving him unworthy of credit, may show he was mistaken,

may call witnesses for that purpose, or examine him as to other statements for the purpose of reconciling or correcting his previous statements, even though the effect may be unfavorable to his credibility."

Bullard v. Pearsell, 53 *N. Y.*, 230.
14 *Abb. N. C.*, 471 *note.*

The statutes and decisions in a number of states, are as follows:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it is in a case where it was indispensable that the party should produce him; but he may contradict him with other evidence and by showing that he has made statements, different from his present testimony.

Digest Statutes of Arkansas, Mansfield, Sec. 2901.

"A party calling a witness may attack his testimony in any other manner except by proving the bad character of the witness."

Bennett v. State, 24 *Tex. App.*, 73, 5 *Southwest*, 527.

"Inconsistent statements can be proven if brought to the witness' attention."

23 *Fla.*, 595.
3 *South*, 211.

"A state's witness on a criminal trial may be contradicted at the instance of the state by evidence of different statements made out of court."

Conway v. State.
118 *Ind.*, 482.
21 *North East*, 285.
11 *Crim'l L. Mag.* 640.

"Plaintiff called a witness relying upon statements made to plaintiff before the trial. When on the stand the witness proved the case for the defendant. Held, that, not for the purpose of impeaching the general character of the witness, but for his own protection, plaintiff might prove the making of such previous statements by the witness."

Smith v. Briscoe,
65 *Md.*, 561.
5 *Atl.*, 334.
3 *Cent.* 733, 6 *East*, 445.

Professor Greenleaf and his editor, Mr. Redfield, are somewhat at variance upon the question here involved. *In favorem vitae*, we side with Professor Greenleaf, and insist that the defendants should have been allowed to prove that the witness

Johnson "had previously stated the facts in a different manner," and "that a party should not be sacrificed to his witness."

Greenleaf on Ev., Vol. 1, *Sec.* 444. [*444 a.

Mr. Best presents the question as to the right of a party to discredit his own witness, very clearly, first as it stood at common law, and secondly under the 17 and 18 *Vict. c* 125, and 28 and 29 *Vict. c* 18, and quotes approvingly the reasoning of a work of authority also relied upon by Prof. Greenleaf in determining that the "weight of authority seems in favor of admitting a party to show that his witness had previously stated the facts in a different manner;" "that the evidence had taken him by surprise and was contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify."

"It may be further remarked, that this is a question in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as civil proceedings; that the ends of justice are best attained, by allowing a free and ample scope for scrutinizing evidence and estimating its real value; *and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences.*"

Best on Evidence,
Vol. 2, *Sec.* 645.
Ph. and Am. Ev. 905.

Feeling confident that enough errors have been shown to warrant a reversal in this case, we will not, as originally intended, present at length an argument upon the grounds of error contained in the fourth, fifth, sixth, seventh and eighth assignments of error, and we will consider them together.

The charge being drawn out to great length and delivered orally after argument of counsel who were required to file exceptions immediately upon its close, rendered it almost impossible to quote the Court accurately in every sentence, or to file many except general exceptions. We think there was error for several reasons as claimed in the fourth assignment of error. The effect of that part of the charge, (*Record, page* 255), here complained of, was to awe jurors into giving to any circumstances predjudicial to defendants undue weight and into minimizing those favorable to them. To bolster them up, where they had doubt, to convict upon feeble circumstances, especially where as complained of in the sixth exception the Court gives undue prominence to the inculpatory circumstances following the killing as being shadowed forth by conduct "characterized by peculiar wickedness, devoid of mercy and charity," followed by an eloquent argument, (*Record, page* 256), upon the terrible wickedness of the "destructive agency that walks abroad and shakes its bloody locks in the very face of those who administer justice in this day and time," followed again by many pages of definitions and illustrations in which are interwoven more or less argument of the inculpatory facts as on (*Record, page* 275), where part of the language, taken with what immediately pre-

cedes and follows, can be construed in no other way than denunciatory of plaintiff in error, where in speaking of conduct of an innocent man, the Court says: "He is, therefore, not usually the man who characterizes his acts of killing by acts of unnaturalness, wickedness, brutality and of great moral depravity and of a total disregard of the rights that belong even to the dead," etc., and (*Record, page* 280), where the Court says: "One actor is gone. He was carried from the place where he was killed and ignominiously put out of sight where it was presumed that he could not be seen. He was not permitted a Christian burial;" then proceeds to picture the manner of killing, funeral ceremonies, bloody trail and "hurling to a disgraceful and ignominous death" in a way that seems to us not only an opinion on the facts, but the very language imports a heated, vehement argument, both in language, manner and emphasis, against the defendants that is unquestionably error, especially when, after a thorough search of the charge, we find no presentation or summing up of facts for the defendants.

See *Reiger v. Davis*, 67 *N. C.*, 185.
State v. Simmons, 6 *Jones L.* 21.
Thorp v. Goewey, 85 *Ill.*, 612.
Thompson v. Force, 65 *Ill.*, 370.
Merritt v. Merritt, 20 *Ill.*, 65, 80.
Ludwig v. Sager, 84 *Ill.*, 99.
Chicago etc., R Co. v. Griffin, 68 *Ill.*, 499, 506.

"The practice of counsel drawing up long instructions and

asking the Court to give them, and of the court giving such instructions has been repeatedly condemned. The practice of asking a Court to give such instructions is especially reprehensible where, as in many cases, the ingenuity of counsel succeeds in injecting an argument into them." "We may here," said the Supreme Court of Illinois, in one case, "with great propriety, take occasion to remark that a practice seems to be growing up to draw out instructions to a very great length and injecting into them an argument of the case. This is bad practice and should not be encouraged by the Courts."

Charging the Jury. Thompson, Sec. 57, pp. 81, 82.
Merritt v. Merritt, 20 *Ill.*, 65-80.
Thompson v. Force, 65 *Ill.*, 370-372.
Chapman v. Conway, 50 *Ill.*, 512.

Without questioning the fair intentions and marked abilities of the Court, nevertheless we think this charge demonstrates that the Court has fallen into the practice above reprehended in counsel.

Upon Record page 277 the Court comments in a way we think entirely unwarranted by the testimony, upon the impeaching testimony produced by defendants. A couple of whiskey peddlers, Bryant Hughes and Aaron Carey, witnesses for the Government, who made contradictory statements, after arriving at Fort Smith, were impeached by a number of respectable witnesses. We recall no one except one of the impeached witnesses, Hughes, who claimed any improper conduct of any one of them,

yet taken as a whole, as worded, the charge upon the subject of impeachment can hardly be said to be given so as to show how the testimony of the *impeached witnesses* is to be weighed, but as assuming conduct on the part of the *impeaching witnesses* that should discredit them. Again we find no summing up of the many strong, positive and circumstantial facts proven for defendants.

Ollie and defendant Hickory are strongly confirmed in their version of the shooting, by many things, particularly the location of the wound upon the body of deceased as received at the middle door, the blood spots, the number and location of bullet holes on the building, range of bullets, and especially by the testimony of John Carey, a Government witness, which clearly indicates that the Marshal foolishly fired his pistol as pre-arranged, as a signal, while defendant with his back to him was going toward the house for his saddle. That he saw defendant was alarmed, and fearing he might get a gun, shot at him again, precipitating the conflict. How natural, young, illiterate, alone at and after the killing, terribly alarmed, fearing to be carried out of his own country for killing the Marshal, knowing how little, as the sequel shows, his testimony would be considered, overwhelmed with the calamity of the situation, that he moved the body. And yet this is all the ground for the terrible characterization, time and again, of this act.

In further support of the sixth Assignment of Error we invite attention to the following:

"The principal danger which attends the practice of 'sum-

ming up' is, that by it an uncandid, weak or prejudiced Judge will communicate his own bias to the jury. He will do this by giving undue prominence to certain portions of the testimony, or by passing it over entirely or with slight attention. It is, therefore, a golden rule, that the Judge, who undertakes to present the evidence to the jury, must array before them *all* the material evidence on either side. He must not single out isolated parts of the testimony and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it, especially he ought not to review only those facts which have a tendency to establish only one side of the case. 'To sum up means, *ex vi termini*, to present *all* the proof to the consideration of the jury, and unless this is done it had better be omitted altogether.' It is obviously wrong for him to single out an isolated fact, and express himself strongly upon it to the undervaluing of the rest of the evidence."

Charging the Jury. Thompson, Sec. 80, *page* 111.

Parker v. Donaldson,

6 *Watts and B.* 132.

Lumpkin J. in Johnson v. Kinsey, 7 *Ga.* 428, 431.

Believing that many reversible errors have been committed and shown, we submit this case, with confidence that it should be reversed and a new trial awarded.

Respectfully submitted,

A. H. GARLAND,

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 16 1893
JAMES H. McKENNEY,
CLERK.

10206-92

CASE No. 15180.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

SAM HICKORY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 841.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

CASE No. 15180.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

SAM HICKORY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 841.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Sam Hickory, the plaintiff in error, and one Tom Shade, both Cherokee Indians, were indicted and tried for the murder of Joseph Wilson, a United States deputy marshal. Shade was acquitted; Hickory was convicted. On the trial the latter admitted that he killed Wilson, and that the circumstances of the homicide were substantially those shown by the prosecution's witnesses, one of whom heard the shots (p. 41), but none of whom

were eyewitnesses. The defense was justification, Hickory claiming that the marshal was the attacking party.

Hickory's main testimony is found at page 200 of the record. According to his story, the marshal came to arrest him for violation of the liquor laws; after the arrest, and while defendant was peacefully proceeding toward the house, the marshal began shooting at him; he ran into the house and an affray occurred there, both parties shooting until the marshal was killed. He then took the marshal's body, put it in a wagon, hauled it off about a mile and a half, and carried it down into a ravine, where it was found two or three days later. He then hid in the neighborhood for awhile and wandered about among friends until he was arrested among the Osage Indians. His story was a very doubtful one, showing no provocation for the marshal's alleged attack, and no possible explanation of it, unless temporary insanity on the part of the deceased. He also was very unsatisfactory in his accounts of his conduct after the homicide.

ASSIGNMENTS OF ERROR.

FIRST.

The prosecution put in evidence a letter alleged to have been written by Hickory to his Indian mistress, which tended to contradict his version of the affair. The letter was dated some three weeks afterwards, was written in the Cherokee language, and was translated as follows (p. 77):

> OLLIE: I write you a few lines. You must never disclose how this is about Tom Shade. Just say that

> I was the only one that did it. You must never tell anybody that he killed the horse and all that he done. I tell you you must not. That is all now. I write in haste.
>
> SAM.

Hickory being called in his own behalf (p. 140), denied that the letter was in his own handwriting. Being shown another paper, he testified that he had written it at the table in court that day. Hickory being still on the stand, his counsel made the following statement (p. 141):

> I now desire to show to the next witness a paper written by the defendant in the presence of the jury, for the purpose of comparison with the papers heretofore introduced, one of which defendant admits writing and the other he denies.

The court having intimated that the evidence was incompetent, the counsel then said :

> To get this matter down right, we offer to show a writing which was made by the defendant in the presence of the jury to compare with the writing on the document marked "X," as produced by Joseph Shade [an irrelevant letter previously introduced without objection to show defendant's handwriting], written previous to this time, and also to compare with the writing marked "A," offered in evidence by the district attorney.

The court excluded the evidence, saying :

> I don't think, if it was competent, that you could compare the writing with but one of the documents. One of these papers is not competent except to compare with the original letter, *and I don't think you can compare two letters both of which are irrelevant in themselves.*

The defendant excepted and did not offer the paper for the purpose of comparison with the writing marked "A" alone, nor did he state that he desired any comparison to be made by the jury themselves. An attorney from Tahlequah was then called, who qualified as an expert in Cherokee handwriting, and gave his opinion on the comparison of Exhibits A and X.

This ruling raises two questions: (1) Is any comparison proper between writings in evidence and totally irrelevant writings introduced for the sole purpose of testing handwriting? (2) In case this question is answered in the affirmative, can the irrelevant writing be specially prepared by defendant for the above purpose?

(1) On comparison of handwritings the authorities are in conflict. They are set forth in the briefs of counsel in *Moore* v. *United States* (91 U. S., 270), and later and with greater fullness in 9 Am. and Eng. Encycl. of Law, at pages 279 to 291. The latter compilation shows that the jury, or an expert unacquainted with the handwriting in question, is allowed to make a comparison of handwriting by juxtaposition, by the Roman law, the Code Napoleon and the English Ecclesiastical Law; by the courts of California, Connecticut, Kansas, Maine, Massachusetts, Mississippi, New Hampshire, Ohio, Vermont, and Virginia; to some extent by the courts of Indiana, Michigan, Minnesota, Missouri, North Carolina, Pennsylvania, South Carolina, Texas, Utah, and West Virginia; and by statute in some other States; while "irrelevant papers are inadmissible for the sole purpose of comparison" in Alabama, Arkansas, Colorado, Delaware, Illinois, Kentucky,

Maryland, Montana, Nebraska, New Mexico, and Tennessee. And the English common law courts were in conflict until the question there was settled by statute. In *Moore* v. *United States* (91 U. S., 270) it was held that *relevant papers already in evidence* could be compared *by the jury* to ascertain genuineness of handwriting, but Mr. Justice Bradley, in delivering the opinion of the court, recognized as the general rule of the common law that there could be no comparison by the court or the jury.

But in the case at bar, as above pointed out, no intention was intimated by defendant's counsel of submitting the writings to the jury for comparison. The writing offered was for submission to an expert merely, and the Supreme Court, as long ago as 1832, in an important case argued by most eminent counsel, had maintained the incompetency of such evidence, Mr. Justice Thompson saying:

> It is a general rule that evidence by comparison of hands is not admissible where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. There may be cases where, from the antiquity of the writing it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents known to be in his handwriting has been admitted. But these are extraordinary instances arising from the necessity of the case, and which do not apply to the one before the court. (*Strother* v. *Lucas*, 6 Pet., 763, 767.)

In *Rogers* v. *Ritter* (12 Wall., 317, 322) Mr. Justice Davis says:

> Obviously the evidence is not obnoxious to the objection that it is a mere comparison of hands; that is,

> a comparison by juxtaposition of two writings, in order to enable a witness without previous knowledge of the handwriting of the party to determine by such comparison whether both were written by the same person.

The decisions of the lower Federal courts are not unanimous on this point (9 Am. and Eng. Encycl. of Law, 289, 290). The rule as laid down by the Supreme Court had been settled by a long series of cases in New York, until the rule was altered by statute (*id.*, p. 287), and in Rhode Island no comparison whatever is admissible (*id.*, p. 291). The opinions of the Supreme Court on this point were *obiter*, but carefully considered, and it is respectfully submitted that it is too late to alter, except by legislation, the common law as thus interpreted, even though recognizing all the force of the criticisms made thereon by some text writers (1 Wharton on Evidence, § 717), which, however, are forcibly combated by others (1 Greenleaf on Evidence, §§ 576–581).

The offer of proof was, therefore incompetent, for the reason that it could only lead to a comparison of irrelevant writings by an expert witness not claimed to have any personal familiarity with defendant's hand.

(2) But the offer was incompetent upon a further principle as to which all the American decisions are in unison. No case decided on this side of the ocean has disputed the rule that a witness can not fabricate evidence to be used in his own favor upon the issue of genuineness of handwriting. In England, by effect of comparatively recent statutes, "a person whose handwriting is in dispute may

be called upon by the judge to write in his presence, and such writing may be compared with the writing in litigation. * * * No doubt occasional advantages may flow from the application of this test. * * * The practice of thus testing a party is indicated by one of the most sagacious of German jurists, Mittermaier, on grounds not only of expediency, but of authority." (1 Wharton on Evidence, § 706.) The text writer just quoted proceeds, however, as follows:

> To such evidence, however, it may be objected that a person who is called upon to write, in a court-house, a piece for judicial inspection, may have strong motives to modify his usual style of writing, and in any view, such writing would be likely to be more formal and regular than a current business hand, and to perplex rather than convince experts. * * * *On cross-examination* of a witness who has denied his signature, such a practice may be proper and efficient. But it is clear that a party should not, on the other hand, be permitted to manufacture evidence for himself by writing his name as a basis for a comparison of hands by a jury. (*Id.*)

It is, indeed, the general rule that on cross-examination the witness may be asked to write in the presence of the jury for the purpose of testing his credibility. This would seem to be a necessary corollary from the general rules of cross-examination. (*Chandler* v. *Le Barron*, 45 Me., 534; *Bronner* v. *Loomis*, 14 Hun, 341.) But in an early case (*Stranger* v. *Searle*, 1 Esp., 14) Lord Kenyon refused to allow the testimony of a witness whose familiarity with defendant's handwriting was derived from seeing him write for the express purpose of qualifying

the witness as an expert, "as the party might write differently from his common mode of writing through design." This case has been frequently approved (1 Greenleaf on Evidence, § 577; *Keith* v. *Lothrop*, 10 Cush., 453; *Chandler* v. *Le Barron*, *supra*; *Reese* v. *Reese*, 90 Pa. St., 89), including courts and text writers who favor the more liberal views as to comparison of handwriting in general (1 Wharton on Evidence, § 707; *King* v. *Donahue*, 110 Mass., 155).

In *King* v. *Donahue*, just cited, the demandant in a writ of dower was confronted by a deed releasing her dower. She then testified that the deed was a forgery, and the judge allowed her to write her name seven or eight times on a slip of paper in the presence of a jury, and to submit the paper to the jury for comparison with the alleged signature to the deed. For this error the judgment was reversed, Ames, J., saying: "We do not find any case in which signatures made for the purpose of being examined have been so admitted. * * * A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness," quoting as follows from the opinion of Mr. Justice Coleridge, in *Doe* v. *Suckermore*, 5 A. & E., 703, 705:

> The test of genuineness ought to be the resemblance not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore of itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with

> him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner.

In *Commonwealth* v. *Allen* (128 Mass., 46–50) the court was asked in vain to reconsider its decision. In *Williams* v. *State* (61 Alabama, 33) a judgment of conviction was reversed for a similar error, Brickell, C. J., saying:

> It would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purposes of comparison. By design a correspondence with or a departure from the disputed writing could be fabricated, etc.

Judge Thompson (1 Thompson on Trials, §§ 1135, 620) refers the rule to the general principle that experiments in the presence of the juror "are generally discountenanced, owing to the liability which exists of the jurors being imposed upon by skillful manipulation or jugglery." (See also *Gulzoni* vs. *Tyler*, 64 Cal., 334.)

The evidence offered in this case was not even as defensible as a writing actually made under the observation of the jury. The writing offered was one already made while previous witnesses were testifying. It was made nominally "in the presence of the jury," but while their attention was directed to other occurrences. It was admittedly made "for the purpose of comparison with the papers heretofore introduced," and was objectionable in the highest degree.

SECOND.

The second assignment of error relates to the admission of testimony of the witness Charles H. Snell (p. 29). After Snell's somewhat lengthy direct examination (pp. 19–29) was concluded, defendant's counsel offered to show that defendant had not been served with any notice of intention to call him as a witness, as required by section 1033 of the Revised Statutes.

There is no doubt that, had not the defect been waived by defendant's counsel, the testimony of Snell must have been excluded, the section being mandatory, and requiring delivery to the defendant of a list of the witnesses two days before the trial. (*Logan* v. *United States*, 144 U. S., 263, 304.)

The exception is valueless, however, for several reasons:

First, the defect was of a kind that can be waived (*Id.* at pp. 305, 306 and cases cited). The rule of the common law is that objections to the competency of the witness must be made, if at all, before his examination in chief; or, if his interest was not then known, as soon as it is discovered. (*Benson* v. *United States*, 146 U. S., 325, 332.) In this last case, at page 337, Mr. Justice Brewer suggests that the rule may be obsolete, but we are unable to discover any authority going further than to allow the trial court a discretion to entertain a motion to strike out in case of inadvertence (*Miller* v. *Montgomery*, 78 N. Y., 282); nor is this latitude universally recognized. (*Donelson* v. *Taylor*, 8 Pick., 390; *Shurtleff* v. *Willard*, 19 Pick., 202; Wharton's Criminal Evidence, § 359, and cases cited; 1 Greenleaf on Evidence, § 421.)

But if the rule be relaxed, nevertheless the question of waiver must be held to be addressed to the discretion of the trial court and not reviewable here except, if at all, in the case of abuse of discretion. (*Miller* v. *Montgomery*, 78 N. Y., 282.) "Acquiesence and waiver are always questions of fact." (*Pence* v. *Langdon*, 99 U. S. R., 578.)

If the trial court had discretion, that discretion was properly exercised in the present case. (*People* v. *Harris*, Mich. Sup. Ct. 1893, 54 N. W. Rep., 648.) The counsel, with the slightest diligence, could have ascertained immediately upon the swearing of the witness whether his name had been furnished to the defendants. There was nothing sudden about the testimony. The witness's examination was long and leisurely, and lasted for a considerable time before he reached any important point in the case. Counsel preferred to sit by and listen to the testimony before inquiring whether the witness was competent. It is scarcely needful to refer to the familiar principle that counsel can not speculate as to the result of testimony by letting it come in first and then, on concluding that it hurts his side of the case, raising a formal objection.

Second. As it finally turned out, the testimony did not prejudice the case of the defendant. Everyone of the points testified to by Snell—the identification of the body, the purpose with which the murdered man approached Hickory, the bullet holes in the doors, the blood tracks on the floor and out into the back yard, the wagon tracks from the back yard to the ravine where the body was found, the absence of the bridle, saddle, and pistol—are

corroborated by Hickory himself. The killing of the horse, that had been already wounded in the affray (p. 206), was entirely immaterial.

Errors are immaterial when exceptant is not prejudiced thereby. (*District of Columbia* v. *Woodbury*, 136 U. S., 450; *Grand Trunk Railroad Company* v. *Ives*, 144 U. S., 408.)

Third. This assignment does not present any question for review. No motion was made to strike out the testimony of the witness and no request was thereafter made for an instruction to the jury that it be not considered. Counsel, before cross-examining, made a statement as to the absence of notice and said, "I want to save the point." The court overruled the "point." *No exception was taken by defendant.* While the point was considered by the court upon the motion for a new trial, that motion was addressed to the discretion of the trial court, and its denial is not reviewable here. (See cases cited in brief in *Hall* v. *United States*.)

THIRD.

The defendant's counsel further assigns for error the refusal of the court to allow him to show that he was surprised by testimony of one John Johnson, a Cherokee, his own witness, and to prove an alleged previous contrary declaration of Johnson through an interpreter.

Johnson, when on the stand, testified that defendant, Tom Shade, was at his house Tuesday evening (the day of the murder), but not again till Friday evening. Isaac Shade, called for defendant, testified that he interpreted

for Johnson when defendant's counsel interviewed the latter before the trial as to what his testimony would be. Witness was then asked, "State whether or not *in your interpretation of his testimony* that he said that Tom stayed at his house Tuesday night, Wednesday night, Thursday night, and Friday night of that week." Objection was made on the ground that defendant was attempting to impeach his own witness by showing prior contradictory statements. Defendant's counsel insisted that he could do so on the ground of surprise. The court sustained the objection and exception was taken.

This assignment of error is also valueless for various reasons.

First. The question was immaterial. The interpreter was asked, not what the witness said to him, but what he himself said to defendant's counsel.

Second. The error, if any, is immaterial within the cases above cited, because it did not prejudice the defendant now before the court. John Johnson's testimony (pp. 103–107) related entirely to the defense of Tom Shade, *who was acquitted.*

Third. By the civil code of Arkansas, indeed (§ 653), a party may impeach his own witness by proof of statements contradicting his present testimony. The State rules of evidence, however, have no force in the Federal courts in criminal cases. (*Logan* v. *United States*, 144 U. S. R., 263, 299.)

The question is thus left to be decided by the rules of the common law. To some extent there has always been a difference of opinion as to what is the common law on

the subject of contradicting one's own witness. While, however, some courts and text writers have dissented, the general consensus of authority has been that while a witness who surprises the party calling him may be cross-examined as to previous statements in contradiction to his present testimony, nevertheless the party calling him is bound by his answers as to these matters, and that other witnesses may not be called to testify that he made contrary statements before the trial (1 Wharton on Evidence, § 549; Redfield's Greenleaf on Evidence, § 444*a*; Chamberlayne's Best on Evidence, § 645; Chase's Stephen on Evidence, p. 230*n*; *Cox* v. *Eayres*, 55 Vt., 24; *Hurley* v. *State*, 46 Oh. St., 320; *Stearns* v. *Merchants' Bank*, 53 Pa. St., 490; *Adams* v. *Wheeler*, 97 Mass., 67; *Bullard* v. *Pearsall*, 53 N. Y., 230; *Smith* v. *Price*, 8 Watts, 447, and other cases cited in above text books).

The authorities, pro and con, are collated and discussed at length by Mr. Wharton, and in the Vermont and Ohio cases above cited. It is said on the one hand that to allow a party to contradict his own witness "would enable the party to destroy the witness if he spoke against him and to make him a good witness if he spoke for him with the means in his hand to destroy his credit if he spoke against him." On the other hand, the right to contradict is maintained "as a security against the contrivance of an artful witness who otherwise might recommend himself to a party by the promise of favorable evidence, being really in the interest of the opposite party, and afterwards by the ruling of contrary evidence ruin his cause. * * * That the ends of justice are best maintained by allowing a free and ample scope for scrutinizing evidence and esti-

mating its true efficiency, and that in the adjustment of criminal cases, more especially, the exclusion of the proof of contrary statements might be attended by the worst consequences." (Wharton, *supra.*)

The conclusion arrived at by the court in the last well-known English case before the Common Law Procedure Act, was that "the point is one upon which judges have differed and opinions may vary to the end of time." (*Melhuish* v. *Collier*, 15 Q. B., 878, 890, *per* Erle, J.)

The law was settled in England by the statute 17 and 18 Vict., c. 125, § 22, enacting that the party "may, in case the witness shall in the opinion of the judge prove adverse * * * by leave of the judge, prove that he has made at other times a statement inconsistent with the present testimony," etc. Somewhat similar statutes have been passed in Massachusetts and many of our other States, as well as Arkansas.

But even under these statutes the contradiction is not allowed for the mere purpose of making evidence in favor of the disappointed party; it is allowed only to counteract really hostile testimony with which the party has been surprised. The statutes are provided to protect against those described by Erle, J., in the last case cited as "treacherous witnesses who will hold out that they can prove facts on one side of the case, and then for a bribe, or from some other motive, make statements in support of the opposite side."

> But a case like the present, where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial

> to the party, is not within the reason or policy of the rule. (*Champ* v. *Commonwealth*, 2 Met., Ky., 17.)
>
> The purpose of the statute is to enable a party to * * * rid himself of damaging testimony * * * Where a witness does not testify to anything prejudicial to the party calling him, there can be no object in impeaching him, and hence the statute can not apply to such case. Nor can it apply to a case where a witness fails to testify to such facts as he is called to prove. Such testimony, though not beneficial, is not prejudicial, and therefore no reason exists for impeaching the witness. (*Hull* v. *State*, 93 Ind., 128, 133.)

Miller v. *Cook* (124 Ind., 101, 104) was very similar to the case at bar. Appellant asked a witness whether certain facts were true. Witness having denied them, he offered to show previous declarations to the contrary. The court said:

> The rule permitting a party to contradict his own witness is statutory and applies only where the testimony given is a surprise to the party calling him, and is prejudicial.

In *Chism* v. *State*, 12 Southern Rep., 852–854 (Mississippi, April, 1893), Cooper, J., said, in a case similar to the case at bar:

> Under no possible view can it be said that the witness Cox testified unfavorably to the State. He stated no facts tending to prove that the defendant Chism was not guilty of the murder of Adair. He only asserted that he (the witness) had no knowledge upon the subject of the killing. We do not hesitate to affirm that no decision of a court or opinion of

an approved writer can be found to support the admissibility of such evidence as was admitted in this case.

Under the English statute it was held that to allow such contradiction, the witness must appear to be adverse in the sense of showing a hostile mind. (*Greenough* v. *Eccles*, 5 C. B. N. S., 786.) In Massachusetts the courts have come to substantially the same result upon a different course of reasoning.

> The object of the statute is to allow a party to impeach the credibility of the witness called by him * * * but the contradiction has no legal tendency as affirmative or independent evidence to establish the truth of the subject matter of the statement. * * * [Witness'] testimony that no such conversation as that claimed by the appellants took place, in the absence of any other evidence as to such conversation, was of no significance or materiality, and no amount of testimony to impair her credit with the jury would be of any aid in the solution of the case. (*Batchelder* v. *Batchelder*, 139 Mass., 1. See also *People* v. *Jacobs*, 49 Cal., 384; *Ryerson* v. *Abington*, 102, Mass., 530.)
>
> If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached. (*People* v. *Mitchell*, 94 Cal., 550, 556).

FOURTH.

There is no reversible error in the charge of the court regarding circumstantial evidence. This charge will be found upon page 255. The assignment of error (p. 293)

is improper, because it is broader than the exception taken (p. 281). The rules of court regarding assignments of error can not have been intended and can not be construed to allow the unsuccessful party to reconsider and redraft his exceptions to rulings on evidence or to the instructions of the court. As the assignment of error does not conform to the exception it is respectfully submitted that it is unavailing for any purpose, and that the exception, being unsupported by a proper assignment of error, has no right to consideration and does not deserve notice by special favor of the court.

But if this point be waived, nevertheless, the exception itself must be held unavailing.

It does not correctly describe any portion of the judge's charge. The exception is to the "court's criticism on circumstantial evidence, denouncing persons who are slow to act on circumstantial evidence as fools and knaves." The charge is as follows:

> Some say we can not do it [find a condition of the mind] by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence; that is a declaration of either fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship.

The charge is rather vehement, on this point, but vehemence is not a ground of exception. (See 2 Thompson on Trials, §§ 2299, 2300.) It is held in all the courts that a man who will not convict upon circumstantial evidence is incompetent to perform one duty of citizenship, that is,

incompetent to be a juror. (1 Thompson on Trials, § 75; *Gates* v. *People*, 14 Ill., 433; *State* v. *West*, 69 Mo., 401; *Jones* v. *State*, 57 Miss., 684.)

FIFTH.

Similar comments might be made on the exception to the charge of the court in relation to the plea of self-defense, which is found at page 266 of the record, the exception being at page 281. The court's remark that a defendant in a murder case who invokes the law of self-defense makes himself judge of the law, juryman on the facts, and marshal to execute the sentence, might, indeed, properly have been qualified, as defendants suggest, by the statement that defendant is not chargeable with the same coolness and deliberation that a court and jury would exert and is therefore not held to the same accuracy of judgment and understanding of his exact duties and rights. This, however, is a claim of an error by *omission* in the charge. The claim is valueless, because it was the duty of defendant's counsel to pray additional instructions if he thought the jury would be misled. (*Pennock* v. *Dialogue*, 2 Pet., 1, 15; *Improvement Co.* v. *Munson*, 14 Wall., 442; *Spring Co.* v. *Edgar*, 99 U. S., 645, 659; 2 Thompson on Trials, §§ 2325, 2341.) But no competent juror could have been misled in this instance.

The error, if any, was entirely cured by the verdict which found defendant guilty of murder and thus, impliedly, found that he had not been guilty of any mere recklessness in resisting an attack, for the court had instructed the jury clearly enough that the verdict, in case

the homicide were committed in an unjustifiably reckless attempt at self-defense, should be not murder but manslaughter. (See pp. 264, 267.)

SIXTH AND SEVENTH.

These assignments of error are too general for consideration here. (See cases on form of exceptions, cited in brief in *Hall* v. *United States.*)

EIGHTH.

No exception lies to a denial of a motion for a new trial. (*Arkansas Cattle Co.* v. *Mann*, 130 U. S., 69, 75, and other cases cited in brief in *Hall* v. *United States.*)

It is respectfully submitted that the record does not show any ground for disturbing the judgment, and that, accordingly, the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.